

# **EXHIBIT B-1**

**In The Matter Of:**

*Yazdani vs.*

*BMW*

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*William Vigilante, Jr., Ph.D.*

*March 15, 2016*

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**Min-U-Script® with Word Index**

Page 1

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
3 PARVEZ and RAZIA :  
4 YAZDANI Plaintiffs, :  
5 -vs- :  
6 BMW OF NORTH AMERICA, :  
7 LLC and :  
8 BMW MOTORRAD USA, a :  
9 Division of BMW OF :  
10 NORTH AMERICA, LLC : NO. 2:15-cv-01427-PD  
11 Defendants :  
12  
13 Tuesday, March 15, 2016  
14  
15 Oral deposition of WILLIAM J.  
16 VIGILANTE, JR., PhD, CPE was taken at the Law  
17 Offices of deLuca Levine, Three Valley Square,  
18 Suite 220, Blue Bell, Pennsylvania, commencing  
19 at 10:00 a.m., before Debra J. Veneziale,  
20 Court Reporter and Notary Public; in and for  
21 the Commonwealth of Pennsylvania.  
22  
23 \* \* \*  
24  
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Page 2

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24

Page 3

1 I N D E X  
2 - - -  
3 WITNESS  
4  
5 WILLIAM J. VIGILANTE, JR., PhD, CPE  
6  
7 EXAMINATION PAGE  
8 BY MR. HEINOLD 5  
9  
10 - - -  
11 E X H I B I T S  
12 - - -  
13  
14 NUMBER DESCRIPTION PAGE MARKED  
15 Vigilante-1 Report 120  
16 Vigilante-2 Case List 120  
17 Vigilante-3 Curriculum Vitae 120  
18 Vigilante-4 Rider's Manual 120  
19 Vigilante-5 Warning 222  
20 Vigilante-6 Photographs 223  
21 Vigilante-7 Sound Rider Article 250  
22 Vigilante-8 You Motorcycle Article 252  
23 Vigilante-9 American Spectator Article 253  
24 Vigilante-10 Motorbike Writer Article 255

Page 4

1 NUMBER DESCRIPTION PAGE MARKED  
2 Vigilante-11 Revzilla Docuemnt 257  
3 Vigilante-12 Photographs 258  
4 Vigilante-13 Photographs 261  
5 Vigilante-14 Photographs 262  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
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<p style="text-align: right;">Page 5</p> <p>1 THE COURT REPORTER: Usual  2 stipulations?  3 MR. HEINOLD: Yes.  4 MR. LEVINE: Yes.  5 - - -  6 (It is hereby stipulated  7 and agreed by and between counsel for  8 the respective parties that sealing,  9 certification, and filing are waived  10 and that all objections, except as to  11 the form of questions, be reserved  12 until the time of trial.)  13 - - -  14 WILLIAM J. VIGILANTE, JR.,  15 PhD., CPE, after having been first duly  16 sworn, was examined and testified as  17 follows:  18 - - -  19 EXAMINATION  20 - - -  21 BY MR. HEINOLD:  22 Q. I know you've been deposed.  23 You don't need instructions from me about a  24 deposition, do you?</p>	<p style="text-align: right;">Page 7</p> <p>1 Q. Yes, all the work that you've  2 done. Well, all the work that's been done,  3 the report, Vigilante Forensic is you, has  4 been done by you?  5 A. That's correct.  6 Q. You issued a report in this  7 case?  8 A. Yes.  9 Q. Is that your only report?  10 A. Yes.  11 Q. No others?  12 A. No others.  13 Q. No supplements?  14 A. No supplements.  15 Q. Is it full and complete to your  16 knowledge right now?  17 A. As of the day I wrote the  18 report it is.  19 Q. Is there something more that  20 you would add to it?  21 A. Well, I've since received a  22 report of the defense expert.  23 Q. Kevin Breen?  24 A. Yes, Kevin Breen.</p>
<p style="text-align: right;">Page 6</p> <p>1 A. I don't think so.  2 Q. Okay. Tell me about your  3 business organization. What's the official  4 name?  5 A. I'm doing business as Vigilante  6 Forensic. The LLC is Vigilante Consulting.  7 Q. Okay. How big is your  8 organization?  9 A. You're looking at it.  10 Q. No staff.  11 MR. LEVINE: I'm not on his  12 staff.  13 MR. HEINOLD: I'm not looking  14 at you.  15 THE WITNESS: No staff.  16 BY MR. HEINOLD:  17 Q. You do everything yourself?  18 A. Yes.  19 Q. Do you outsource any of it?  20 A. No.  21 Q. So everything that you've done  22 here for this case is all you?  23 A. All the work that I've done,  24 yes.</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. And has that caused you to  2 change your opinions?  3 A. It has not caused me to change  4 my opinions, but it does lead to additional or  5 new opinions.  6 Q. Okay. Can you tell me what  7 your new opinions are?  8 A. Basically they're in rebuttal  9 to his report. I don't believe that what he's  10 stating in his report is correct. I take  11 issue with several of the points that he made  12 in his deposition, and I'm happy to go through  13 them if you would like.  14 Q. Okay. Let's get to that a bit  15 later.  16 How long have you been working  17 as Vigilante Forensic?  18 A. Since October of 2015.  19 Q. What were you prior to that?  20 A. I was an employee of Robson  21 Forensic.  22 Q. Were you doing the same type of  23 work?  24 A. Yes.</p>

<p style="text-align: right;">Page 9</p> <p>1 Q. Human factors?  2 A. Yes.  3 Q. What do you describe as human  4 factors?  5 A. Basically human factors are  6 ergonomics, which is a synonym, is a science  7 that studies how people interact with their  8 use of all different types of products,  9 machines, systems and environments.  10 And what we're interested from  11 the human factors side is the person that's  12 using the products. We're interested in their  13 perceptual abilities, that is their ability to  14 see, hear and capture information from the  15 environment, how they process that information  16 and make decisions. How things such as  17 expectancies and prior experiences affect how  18 we perceive things and how we make decisions.  19 We are also interested in  20 people's physical abilities and limitations.  21 For example, strengths and weaknesses, ability  22 to lift, range of motion, sizings of people,  23 human gait or ability to walk, run, so forth.  24 And then we as a field in a</p>	<p style="text-align: right;">Page 11</p> <p>1 Plaintiffs, I'm talking about in the  2 litigation setting where you are criticizing  3 the warning.  4 A. Yes, overall my case work tends  5 to trend about 60, 65 Plaintiff, Defendant.  6 Q. 60 to 65 Plaintiff?  7 A. Yes.  8 Q. And the rest is Defendant?  9 A. 35, 40 Defendant.  10 Q. All right. How many of your  11 Plaintiff clients are insurance companies?  12 A. Subrogation work is maybe 30  13 percent of my work.  14 Q. Of your total?  15 A. Yes. Maybe that's little high.  16 Q. How about for Allstate?  17 A. Allstate, like total percentage  18 of work?  19 Q. Allstate Insurance, how much  20 work do you do for them?  21 A. I don't have a number to give  22 you.  23 Q. Can you give me an  24 approximation?</p>
<p style="text-align: right;">Page 10</p> <p>1 professional's work with engineers, designers  2 and architects design products, machines and  3 systems that are easy to use, that are  4 efficient to use and most importantly are safe  5 to use.  6 Q. Do you work in any capacity  7 other than forensics? Do you know what I mean  8 by that?  9 A. Sure. I do traditional  10 consulting work at times.  11 Q. What percentage of your work is  12 what you refer to as traditional consulting  13 work?  14 A. Traditionally it's been a small  15 percentage, anywhere from five to 10 percent.  16 At some points of the year it's zero percent.  17 Q. When you say percentage, are  18 you talking about percentage of the income you  19 create from it, or are you talking about the  20 percentage of projects?  21 A. I think they're probably  22 positively correlated, so both.  23 Q. What percentage of your work do  24 you do for Plaintiffs? And when I say</p>	<p style="text-align: right;">Page 12</p> <p>1 A. I don't think I can give you  2 that. It would be a wild guess. I don't  3 track information based upon insurance  4 carrier.  5 Q. Okay. Well, how many cases do  6 you have open right now?  7 A. Open cases, I'm going to say  8 around 50.  9 Q. And how many of them are  10 currently open that you're retained on behalf  11 of Allstate?  12 A. I don't know. I would say that  13 there's at least one other, but I don't know  14 how many more if there is more than that.  15 Q. How about this office, deLuca  16 Levine, how much work do you do for this  17 office?  18 A. I've done work for them in the  19 past, and I'm currently working on other cases  20 for them.  21 Q. And what percentage of your  22 business would you say is from this office or  23 iterations of this office?  24 A. Yes, maybe less than five</p>

<p style="text-align: right;">Page 13</p> <p>1 percent.  2 Q. How many do you have currently  3 open?  4 A. I have maybe five, six cases  5 open.  6 Q. Are any of those on-product  7 warning cases?  8 A. Yes.  9 Q. How many?  10 A. All of them.  11 Q. On product?  12 A. Yes.  13 Q. In each of those cases are you  14 advocating for an on-product warning?  15 A. In each of those cases I'm  16 advocating to my opinion.  17 Q. Is your opinion that there  18 should be an on-product warning?  19 A. It depends on the case.  20 Q. So the answer to my question  21 would be no, not each of the cases you're  22 advocating for an on-product warning?  23 A. It depends on the case. I  24 don't recall the cases at the moment. So some</p>	<p style="text-align: right;">Page 15</p> <p>1 of those cases, or are you involved in a case  2 where you haven't yet issued a report?  3 A. I think most of them I have  4 issued a report. There may be one or two that  5 I haven't.  6 Q. Any of them involve  7 motorcycles?  8 A. No.  9 Q. Have you ever had a motorcycle  10 case before?  11 A. In what way? I've been  12 involved in motorcycle cases in the past where  13 they've been involved in collisions, whether  14 they be multi vehicle or single vehicle,  15 whether they be a dirt bike type vehicle or a  16 road vehicle. So I've been involved in  17 motorcycle cases in the past.  18 Q. Well, how about motorcycle  19 cases where the issue is warning?  20 A. I don't recall any offhand.  21 Q. Do you own a motorcycle?  22 A. Yes.  23 Q. What do you own?  24 A. I own a Harley-Davidson Softail</p>
<p style="text-align: right;">Page 14</p> <p>1 of them may be on-product. Some of them may  2 not be. It may not be relevant.  3 Q. All right. I'm lost, so let me  4 start over.  5 A. Sure.  6 Q. You said you have five or six  7 cases currently with this office?  8 A. Yes, five or six additional  9 cases.  10 Q. Additional cases. And I asked  11 how many of those involve the issue of  12 on-product warning and I thought you said all  13 of them?  14 A. Yes, maybe I misunderstood the  15 question. They're all warnings cases.  16 Q. Yes.  17 A. I don't recall if all of them,  18 in my opinions, I've come to the opinion that  19 they needed an on-product warning. Some of  20 them may have been that the on-product warning  21 provided was not effective, and some of them  22 may not have involved an on-product warning at  23 all.  24 Q. Have you issued reports in each</p>	<p style="text-align: right;">Page 16</p> <p>1 Deluxe 2007.  2 Q. Is that air-cooled?  3 A. It is air-cooled.  4 Q. Does it have any warning  5 stickers affixed to it?  6 A. I don't think that there's any  7 warning stickers on the exterior of the  8 surfaces. There may be some under the seat,  9 but I don't recall offhand.  10 Q. Okay. If you don't recall, then  11 this is probably an unfair question, but what  12 would the stickers under the seat say?  13 A. My guess, if I have to guess,  14 is that they deal with the electrical system.  15 Q. Okay. You're not aware of any  16 other stickers?  17 A. Nope.  18 Q. Is this an air-cooled engine?  19 A. Yes.  20 Q. Do you idle it at a standstill?  21 A. Yes, I do.  22 Q. Okay. For how long?  23 A. I've been known to idle it for  24 up to 30 minutes sitting in my garage warming</p>

<p style="text-align: right;">Page 17</p> <p>1 up, the same thing Mr. Yazdani was doing on  2 the day of the incident.  3 Q. How often?  4 A. Every winter, because I do the  5 same thing that Mr. Yazdani did. I would  6 start the bike every couple weeks and I would  7 let it run at least 10 minutes, sometimes 20,  8 sometimes up to 30.  9 Q. Would you do that if there was  10 an item in the manual that said don't do that  11 because it might catch a fire?  12 A. It doesn't say that in my  13 manual. In fact, it tells me --  14 Q. I said if it did.  15 A. I'm sorry, in my manual it  16 tells me that you're supposed to let it idle  17 and warm up. If there was a warning in the  18 manual, I would have to see it and figure out  19 why it's there, determine what the  20 consequences are.  21 Q. The warning in your Softail  22 manual says what about warming it up?  23 A. There is no warning against  24 warming it up. It's an instruction that says</p>	<p style="text-align: right;">Page 19</p> <p>1 of them idle for multiple minutes in the  2 winter because I don't winterize the bike  3 because I like to ride them through the winter  4 months when it get a little bit warmer.  5 So I will start them every  6 couple weeks, this has been my practice for a  7 number of years, and let them idle. How long  8 I let them idle, I let them at least idle 10  9 minutes and sometimes I let them go longer,  10 depending upon what I'm doing.  11 Q. You let them go longer by  12 choice or you let them go longer because you  13 were distracted and didn't get back to it  14 after 10 minutes?  15 A. Well, I don't think it's  16 necessarily that I was distracted and didn't  17 get back to it. It's that I didn't have a  18 concern to let it go a little bit longer if I  19 was involved in something else.  20 Q. Was it your intent to leave it  21 run for 30 minutes, or did you become involved  22 in something else and not think about it?  23 A. Yes, I became involved in  24 something else and didn't think about it. But</p>
<p style="text-align: right;">Page 18</p> <p>1 to leave the bike idle and warm up.  2 Q. Does it say how long?  3 A. It says: Starting the Engine,  4 Caution: The engine should be allowed to run  5 slowly for 15 to 30 seconds. This will allow  6 the engine to warm up and let oil reach all  7 surfaces needing lubrication. Failure to  8 comply can result in engine damage.  9 Q. That is 15 to 30 seconds?  10 A. Yes.  11 Q. When you idled your  12 Harley-Davidson -- do you still own it?  13 A. Yes.  14 Q. When you do that, how did you  15 determine what was the safe period of time to  16 do it?  17 A. First of all, I didn't know  18 that there was an unsafe limit on how long to  19 leave it idle at a standstill. I'm not sure  20 that there is an unsafe time period to leave  21 it idle at a standstill. So obviously that  22 doesn't apply to my bike.  23 And this is the third  24 Harley-Davidson I've owned, and I've let all</p>	<p style="text-align: right;">Page 20</p> <p>1 it wasn't my intent not to let it run for 30  2 minutes.  3 Q. What were the other two  4 Harley-Davidson motorcycles that you owned?  5 A. I owned a 2006 Softail Deuce  6 and a maybe 2004 Sportster 880.  7 Q. Do you only own the one now?  8 A. Yes.  9 Q. You only one at a time?  10 A. Yes, that's all my wife will  11 allow.  12 Q. Understood. 2004, what was it?  13 A. Sportster.  14 Q. And you said you did the same  15 in terms of starting them up?  16 A. Yes.  17 Q. All right. When you obtained  18 each of these motorcycles, were they new?  19 A. They were all used.  20 Q. Did you get a manual with them?  21 A. I don't think I got a manual  22 with any of them.  23 Q. Did you secure a manual?  24 A. I did for the '07 Deluxe. I</p>



<p style="text-align: right;">Page 21</p> <p>1 don't recall if I did for '06 Deuce.  2 Q. What about the '04 Sportster?  3 A. I don't recall.  4 Q. Why did you get a manual for  5 the '07 Deluxe?  6 A. Well, typically I do my own  7 work, so I purchased the manual and the  8 service guide so if I have to add something,  9 take something off, do some work I have the  10 material I need to understand how to do so.  11 Q. When you say you do your own  12 work, are you talking about doing your own  13 maintenance?  14 A. Sure. Then I do my own  15 customization.  16 Q. What kind of customization work  17 do you do?  18 A. Well, for example, on the  19 Deluxe I replaced the handlebars, the risers  20 and the controllers up front, replaced the  21 cables, clutch cable, brake cable, upgraded  22 them to stainless. So different things like  23 that.  24 Q. How long have you been riding</p>	<p style="text-align: right;">Page 23</p> <p>1 A. Maybe when I was 12, 13.  2 Q. And had it for how long?  3 A. I had it until about 17, 18.  4 Q. And then you had nothing until  5 you bought the Sportster?  6 A. That's right.  7 Q. How old are you now?  8 A. Forty four.  9 Q. Do you consider yourself an  10 expert in motorcycles?  11 A. I consider myself maybe an  12 advanced motorcyclist. I'm not sure that  13 expert would be the correct term.  14 Q. So the answer to my question is  15 no?  16 A. The answer to your question is  17 what I gave you.  18 Q. Can you answer that question  19 yes or no, are you an expert -- do you  20 consider yourself an expert in motorcycles?  21 A. I would consider myself an  22 advanced rider.  23 Q. Okay. Well, we're in a court  24 of law and people are going to be declared</p>
<p style="text-align: right;">Page 22</p> <p>1 and working on motorcycles?  2 A. I started riding when I was  3 preteen, dirt bikes at the time, and then  4 there was a lapse before I bought my first  5 Harley, when I could afford to buy my first  6 Harley.  7 Q. How long have you owned bikes?  8 A. Well, I owned them since I was  9 preteen.  10 Q. How long have you owned  11 Harleys? When did you buy the 2004?  12 A. Where or when?  13 Q. When, what year?  14 A. I'm going to say maybe 2007,  15 2008.  16 Q. Did you own bikes before that?  17 A. I did own bikes before that.  18 Q. What did you own?  19 A. I owned dirt bikes.  20 Q. What type?  21 A. I had a Yamaha. That's it.  22 Q. Just one?  23 A. Yes.  24 Q. And when did you buy that?</p>	<p style="text-align: right;">Page 24</p> <p>1 experts or not. Are you an expert in  2 motorcycles for purposes of your opinion here  3 today?  4 A. It depends on the question as  5 to whether or not I'm an expert in that area  6 as it relates to motorcycling. So if we're  7 talking about rider behavior, I would consider  8 myself, with the experience, knowledge,  9 education and training, to be an expert in  10 that area.  11 If you're talking about whether  12 or not I can whip a bike around the racetrack  13 at 150 miles an hour, I would consider myself  14 not an expert.  15 Q. How about in design?  16 A. It depends on the issue.  17 Q. Outside of the warning issue?  18 A. It depends on the issue.  19 Q. What issues do you consider  20 yourself an expert in design of the  21 motorcycle?  22 A. If there's issues related to  23 controls and displays, I consider myself an  24 expert in the design for a motorcycle or any</p>



<p style="text-align: right;">Page 25</p> <p>1 other product.</p> <p>2 Q. All right. How about other</p> <p>3 than controls and displays?</p> <p>4 A. It depends on the issue.</p> <p>5 Q. What issues do you consider</p> <p>6 yourself an expert in motorcycles other than</p> <p>7 design and displays generally?</p> <p>8 A. Controls, displays,</p> <p>9 instructional information, warnings. It could</p> <p>10 involve training. It depends on the question.</p> <p>11 Q. How about an expert in</p> <p>12 mechanical operations of a motorcycle, any</p> <p>13 design and the way it operates?</p> <p>14 A. I won't be offering any</p> <p>15 opinions with regard to the mechanical design</p> <p>16 of the motorcycle unless I'm asked.</p> <p>17 Q. Are you an expert in the issues</p> <p>18 of mechanical design of motorcycles?</p> <p>19 A. Again, it depends on the</p> <p>20 question. If I'm asked the question, I'll be</p> <p>21 happy to answer. My opinions, as I plan on</p> <p>22 giving them, are set forth in my report which</p> <p>23 deal with failure to provide adequate warning.</p> <p>24 Q. Are you an expert on how the</p>	<p style="text-align: right;">Page 27</p> <p>1 myself an expert in the design. I never</p> <p>2 designed an air-cooled engine or the oil</p> <p>3 system for an air-cooled engine. But there</p> <p>4 are aspects of it that I may be or have expert</p> <p>5 insight into, including potentially the</p> <p>6 problems with the location of the oil sight</p> <p>7 glass being on the left side of the crane case</p> <p>8 as opposed to the right side and the potential</p> <p>9 problems it creates based upon BMW's</p> <p>10 substandard design.</p> <p>11 Q. What is your expertise in</p> <p>12 motorcycle design that you feel permits you to</p> <p>13 offer that type of opinion?</p> <p>14 A. Well, first of all, I don't</p> <p>15 plan on offering it unless I'm asked. But I'm</p> <p>16 not going to cut myself off from being able to</p> <p>17 answer it if you do, in fact, ask it.</p> <p>18 So, again, my opinions as I</p> <p>19 plan to give them are laid out in my report.</p> <p>20 If you want to go into these other areas, I</p> <p>21 want to reserve my ability to answer them. So</p> <p>22 it depends upon the question.</p> <p>23 MR. LEVINE: May I interject</p> <p>24 for just a moment. As you noticed, I haven't</p>
<p style="text-align: right;">Page 26</p> <p>1 oil system of an air-cooled motorcycle should</p> <p>2 be designed?</p> <p>3 A. I never designed the --</p> <p>4 Q. You can answer that yes or no.</p> <p>5 Can you not answer that question yes or no?</p> <p>6 A. Well, first of all, I can</p> <p>7 answer it if you allow me to finish and not</p> <p>8 interrupt me. Second, I'll answer the way I</p> <p>9 feel best. If that works for you we can</p> <p>10 continue. Otherwise, we can stop now and come</p> <p>11 back at a later time.</p> <p>12 Q. No, we're not going to stop.</p> <p>13 I'm going to ask the question, you're going to</p> <p>14 answer the question. If I don't feel you</p> <p>15 answered my question, I'll ask you again. And</p> <p>16 if I don't feel you answered it again, I'll</p> <p>17 ask it again. If we get to the point where</p> <p>18 you don't answer my questions, perhaps then</p> <p>19 we'll stop and we'll come back at a later</p> <p>20 time.</p> <p>21 So, do you consider yourself an</p> <p>22 expert in the design of the oil system in an</p> <p>23 air-cooled motorcycle?</p> <p>24 A. Yeah, I would not consider</p>	<p style="text-align: right;">Page 28</p> <p>1 been very obstructive. It is my understanding</p> <p>2 that Mr. Vigilante's testimony, the scope of</p> <p>3 will be within the four corners of his report,</p> <p>4 although, they may be expanded by some</p> <p>5 responses to your experts' report. While I do</p> <p>6 appreciate you're trying to understand the</p> <p>7 full scopes of his expertise, we are only</p> <p>8 offering him as an expert within the four</p> <p>9 corners of his report.</p> <p>10 BY MR. HEINOLD:</p> <p>11 Q. Have you ever written any</p> <p>12 articles on motorcycle warnings?</p> <p>13 A. Not specifically to motorcycle</p> <p>14 warnings.</p> <p>15 Q. Have you done any research on</p> <p>16 motorcycle warnings?</p> <p>17 A. Not specific for motorcycle</p> <p>18 warnings, but I have done a whole lot of</p> <p>19 research on the factors that affect the</p> <p>20 adequacy of product warnings, and I've done</p> <p>21 research on the perceptions of motorcycle</p> <p>22 riders for different issues and topics.</p> <p>23 Q. Operational issues?</p> <p>24 A. Yes.</p>

<p style="text-align: right;">Page 29</p> <p>1 Q. Any presentations on motorcycle  2 warnings?  3 A. Not specifically on motorcycle  4 warnings.  5 Q. Okay. Any articles or research  6 or presentations on on-product motorcycle  7 warnings?  8 A. Not related specifically to  9 on-product warnings, but generally related to  10 motorcycle on-product warnings, yes.  11 Q. Generally, how?  12 A. Because they deal with product  13 warnings for all, not specifically a  14 motorcycle or specifically another widget, but  15 that apply to all products.  16 Q. Have you written any articles  17 on on-product labels?  18 A. Yes.  19 Q. What have you written on  20 on-product warnings? Is it in your C.V.?  21 A. Yes.  22 Q. Can you identify which ones are  23 related to on-product warnings?  24 A. Sure. Do you have a version</p>	<p style="text-align: right;">Page 31</p> <p>1 A. Generally, my conclusion is  2 that consumers have a different expectation or  3 understanding of that phrase as opposed to the  4 intention of the manufacturer.  5 Q. Meaning what?  6 A. Meaning that they believe the  7 phrase means something different than what the  8 manufacturer intended.  9 Q. What do you believe they mean?  10 A. Well, the manufacturer often  11 means it or intends it to mean don't leave the  12 product out of your site, whereas the consumer  13 believes that as long as the product is in  14 what they believe to be a safe state, they can  15 go about their daily lives coming back to  16 check on it on a periodic basis.  17 Particularly, not aware that  18 there's a potential fire hazard or other  19 hazard associated with the product that it can  20 occur at any moment without forewarning or  21 advanced forewarning.  22 Q. You mean like don't leave this  23 because it might catch on fire?  24 A. Sure.</p>
<p style="text-align: right;">Page 30</p> <p>1 date on there just so we're talking --  2 Q. I have the version date that  3 you gave me, November 1, 2015.  4 A. Okay.  5 Q. Is there an updated version?  6 A. There looks like that's the  7 most updated version. So, Page 5, the first  8 one is a Joyce, Byrd, Vigilante, Wogalter  9 article dealing with labeling and format  10 preferences for on-product warnings and  11 labels.  12 Q. Page 5, the one that says  13 Over-the-counter drug labeling?  14 A. Correct. The second one,  15 Consumers' interpretation of the statement:  16 "Do not leave (insert product here)  17 unattended." That is both on product and in  18 manual.  19 Q. What was your conclusion in  20 that article?  21 A. I'm sorry?  22 A. The Consumers' interpretation  23 of the statement, "Do not leave blank  24 unattended", what was your conclusion?</p>	<p style="text-align: right;">Page 32</p> <p>1 Q. And that would send a different  2 message than just don't leave this unattended?  3 A. Well, I think you're maybe  4 minimizing the issue. It's better off to read  5 the paper. I don't remember everything that's  6 in the paper. I've given you the general --  7 Q. Do you still have these papers?  8 A. I'm sure I do.  9 Q. If I requested them, you would  10 be able to find them and produce them?  11 A. I might. You can also obtain  12 them. These are all publicly available.  13 Do you want me to continue?  14 Q. Sure.  15 A. The next one is the top of Page  16 6, Nemire and Vigilante. Page 7, the first  17 one related to on-product is Vigilante  18 Wogalter 1999.  19 MR. LEVINE: Can you just spell  20 Wogalter for her?  21 THE WITNESS: W-O-G-A-L-T-E-R.  22 The second one also deals with on-product  23 labeling, Vigilante, Wogalter 1998.  24 BY MR. HEINOLD:</p>

Page 33

1 Q. Did you study under him?  
2 A. Mike Wogalter is my major  
3 advisor. Wogalter, Conzola and Vigilante,  
4 2006 is applicable to the design of the text  
5 in on-product warnings. There's a similar  
6 publication under that, Wogalter, Vigilante,  
7 1999.  
8 Next page, Wogalter, Vigilante,  
9 2006 is a book chapter related to the  
10 attention switch and maintenance of warnings  
11 both on product and in manual. Wogalter,  
12 Vigilante 2010 deals with formatting of on  
13 product labels.  
14 Q. Some of these were written when  
15 you were a student at NC State?  
16 A. Some of them were done while I  
17 was a graduate student at North Carolina State  
18 University.  
19 Q. I also saw in your C.V. that  
20 you listed the Motorcycle Safety Foundation.  
21 What is that?  
22 A. The Motorcycle Safety  
23 Foundation is a nonprofit organization in this  
24 country that looks to improve the safety of

Page 34

1 motorcyclist by offer of training and  
2 education. Many states, such as Pennsylvania,  
3 it's Motorcyclist Safety Foundation classes  
4 are offered free to licensed motorcyclists in  
5 those looking to be a licensed motorcyclist.  
6 Q. What are the important issues  
7 of safety that they're dealing with, mostly  
8 operation?  
9 A. Mostly operation, and some of  
10 them deal with, for example, precheck  
11 inspections of the motorcycle. But most of  
12 the emphasis is on road traveling safety.  
13 Q. Have you published anything in  
14 your work in that organization?  
15 A. I have not.  
16 Q. Do you serve -- in what  
17 capacity do you serve in the organization?  
18 A. I don't serve in any capacity.  
19 I've taken some of their education that they  
20 offer.  
21 Q. You're a member?  
22 A. I'm not a member.  
23 Q. You're not a member. There's  
24 just classes that you take?

Page 35

1 A. Sure.  
2 Q. Are they operational classes?  
3 A. Well, again, they deal with  
4 basic rider course. It deals with everything  
5 from personal protective equipment to pretrip  
6 inspections, the correct purchasing of the  
7 equipment to issues related while you're  
8 riding or traveling.  
9 Q. How many classes have you  
10 taken?  
11 A. I've taken two.  
12 Q. And when did you take those?  
13 A. The basic rider course was  
14 probably 2005. The off-highway motorcycle  
15 course maybe 2006, 2007. Or I'm sorry, the  
16 basic rider course was 2006, 2007. The  
17 off-highway motorcycle course was maybe a year  
18 or two before that.  
19 Q. Anything about warnings in that  
20 organization?  
21 A. How do you mean?  
22 Q. Well, anything taught about  
23 warnings?  
24 A. Well, I'm sure they give plenty

Page 36

1 of warnings.  
2 Q. You said you took two classes.  
3 Anything about warnings in those two classes?  
4 A. I don't understand what you're  
5 asking me.  
6 Q. You're not a member of the  
7 organization?  
8 A. That's correct.  
9 Q. You don't serve it in any  
10 capacity?  
11 A. I don't serve it in any  
12 capacity, that I'm aware of.  
13 Q. You don't hold a position where  
14 you're an officer or a director or anything of  
15 that nature?  
16 A. No, I do not.  
17 Q. Have you taught classes there?  
18 A. No, I have not.  
19 Q. So you've taken two classes?  
20 A. That's correct.  
21 Q. One was basic rider class and  
22 one was an off-road riding class?  
23 A. That's correct.  
24 Q. And neither of those two

<p style="text-align: right;">Page 37</p> <p>1 classes, did they address the issue of</p> <p>2 warnings, motorcycle warning, manual or on</p> <p>3 product?</p> <p>4 A. Are you asking me whether they</p> <p>5 addressed the design and development of</p> <p>6 warnings for motorcycles in the class, or are</p> <p>7 you asking whether or not they provided</p> <p>8 warnings related to the operation or ownership</p> <p>9 of motorcycles in those classes?</p> <p>10 Q. Did they teach you about</p> <p>11 warnings?</p> <p>12 A. Yes, I'm going to say yes.</p> <p>13 Q. What did they teach you?</p> <p>14 A. That you should look for</p> <p>15 warnings and follow the warnings that they</p> <p>16 provide during the classes and during the</p> <p>17 training.</p> <p>18 Q. Were they classes -- they did</p> <p>19 provide warnings during classes and training?</p> <p>20 A. Sure.</p> <p>21 Q. Were they operational in terms</p> <p>22 of riding warnings?</p> <p>23 A. Sure. They would give you</p> <p>24 warnings. For example, you should wear a</p>	<p style="text-align: right;">Page 39</p> <p>1 Incorporated, et al.</p> <p>2 Q. This is 2013?</p> <p>3 A. Yes. And then 7/2014, Ramon</p> <p>4 Ernesto Ortega vs. Hector Enrique Lopez,</p> <p>5 Osceola Farms. That's a motor scooter, not a</p> <p>6 motorcycle.</p> <p>7 Q. Which one was that? I'm</p> <p>8 sorry.</p> <p>9 A. July 2014.</p> <p>10 Q. Vandenberg vs. Brunswick?</p> <p>11 A. I'm sorry, that's actually a</p> <p>12 typo. That should be 2015.</p> <p>13 Q. All right. So July 2014 as it</p> <p>14 appears at Page 4 at the top, Vandenberg vs.</p> <p>15 Brunswick?</p> <p>16 A. On my Page 5 it's July 2014,</p> <p>17 out of order. It goes from June --</p> <p>18 Q. Oh, I see, okay.</p> <p>19 A. Sorry about that.</p> <p>20 Q. No. I was looking at the top</p> <p>21 of Page 4, July of 2014, Vandenberg vs.</p> <p>22 Brunswick.</p> <p>23 A. No, that's not it.</p> <p>24 Q. In that case, who -- in</p>
<p style="text-align: right;">Page 38</p> <p>1 helmet. You should wear eye protection. You</p> <p>2 should practice the search, evaluate, execute</p> <p>3 strategy when riding to potentially avoid</p> <p>4 collisions. So I'm sure that there was</p> <p>5 multiple warnings that they gave through the</p> <p>6 classes and trainings.</p> <p>7 Q. Any warnings that you would</p> <p>8 consider relevant to your opinions in this</p> <p>9 case?</p> <p>10 A. No.</p> <p>11 Q. I have your Testimony List. Is</p> <p>12 that up to date?</p> <p>13 A. Do you have a date on it?</p> <p>14 Q. 1/1/16.</p> <p>15 A. It's been updated since then.</p> <p>16 Q. Okay. Have any of these -- any</p> <p>17 of the cases on the Testimony List involved</p> <p>18 motorcycles?</p> <p>19 A. If you give me a moment, I'll</p> <p>20 be happy to check.</p> <p>21 A. Okay. Two of them.</p> <p>22 Q. Okay. Which ones?</p> <p>23 A. August 2013, David Vititoe vs.</p> <p>24 Rocky Mountain Pavement Maintenance,</p>	<p style="text-align: right;">Page 40</p> <p>1 Vandenberg vs. Brunswick, who retained you?</p> <p>2 A. I was retained on behalf of the</p> <p>3 Plaintiff.</p> <p>4 Q. What was the issue in that</p> <p>5 case?</p> <p>6 A. That had to do with fall</p> <p>7 protection on the upper deck of a pleasure</p> <p>8 yacht.</p> <p>9 Q. Is that case still pending?</p> <p>10 A. That --</p> <p>11 MR. LEVINE: Experts are often</p> <p>12 the last to know.</p> <p>13 MR. HEINOLD: Only if their</p> <p>14 bill has not been paid.</p> <p>15 THE WITNESS: That one went to</p> <p>16 trial in June of last year.</p> <p>17 BY MR. HEINOLD:</p> <p>18 Q. What was the result?</p> <p>19 A. I don't recall. And I don't</p> <p>20 know if the bill was paid.</p> <p>21 Q. So Orgega vs. Lopez and Osceola</p> <p>22 Farms, is that July 2015 or '16?</p> <p>23 A. 2015.</p> <p>24 Q. Okay. And that was also a</p>

<p style="text-align: right;">Page 41</p> <p>1 motorcycle case?</p> <p>2 A. That was a motor scooter.</p> <p>3 Q. Okay. What was the issue in</p> <p>4 that case?</p> <p>5 A. That was a truck versus motor</p> <p>6 scooter collision at a T-intersection, and it</p> <p>7 had to do with the ability of the operators to</p> <p>8 see and avoid each other.</p> <p>9 Q. How about the Vivitoe case?</p> <p>10 A. Vivitoe was a Harley-Davidson</p> <p>11 Softail Deluxe that ran into the back of a</p> <p>12 trailer that was attached to a truck that was</p> <p>13 stopped on a four-lane roadway at a green</p> <p>14 traffic light at night.</p> <p>15 Q. Who retained you in this case?</p> <p>16 A. I was retained on behalf of Mr.</p> <p>17 Vivitoe.</p> <p>18 Q. Did that go to trial?</p> <p>19 A. Yes.</p> <p>20 Q. What was the result?</p> <p>21 A. They found for David Vivitoe,</p> <p>22 although the damages were less than Plaintiff</p> <p>23 I think was hoping for.</p> <p>24 Q. Which sometimes occurs.</p>	<p style="text-align: right;">Page 43</p> <p>1 and his turn signal. I just don't recall if</p> <p>2 that was an issue.</p> <p>3 Q. Okay. Any of these involve the</p> <p>4 assessment of the manufacturer's warnings,</p> <p>5 whether in manuals or on product?</p> <p>6 A. No.</p> <p>7 Q. And I'm not limiting that</p> <p>8 question to motorcycles.</p> <p>9 A. I don't understand.</p> <p>10 Q. The first questions I asked</p> <p>11 about motorcycles.</p> <p>12 A. You're talking about these two</p> <p>13 specific cases?</p> <p>14 Q. No. I'm talking about your</p> <p>15 list. On your list, any of these cases --</p> <p>16 your testimony in any of these cases concern</p> <p>17 manufacturer's -- the quality of</p> <p>18 effectiveness, et cetera, of the</p> <p>19 manufacturer's warning, whether in a manual or</p> <p>20 on product?</p> <p>21 A. Yes.</p> <p>22 Q. Can you tell me which ones?</p> <p>23 A. Starting on my copy it's the</p> <p>24 first one, 2012, that's the Power vs.</p>
<p style="text-align: right;">Page 42</p> <p>1 A. He wasn't wearing a helmet.</p> <p>2 Q. But neither of those dealt with</p> <p>3 warnings -- did either of those deal with</p> <p>4 warnings?</p> <p>5 A. Well, they didn't deal with</p> <p>6 product warnings, per se. The Vivitoe issue</p> <p>7 was an issue of the failure of the lights on</p> <p>8 the back of the trailer to provide adequate</p> <p>9 warning as to the stopped state of the tractor</p> <p>10 trailer.</p> <p>11 Q. Did any of this testimony deal</p> <p>12 with motorcycle warnings?</p> <p>13 A. Warnings on the motorcycle</p> <p>14 itself?</p> <p>15 Q. Yes, or related to the</p> <p>16 motorcycle?</p> <p>17 A. Nothing in the Vivitoe matter.</p> <p>18 The warnings related to the signals on the</p> <p>19 back of the trailer of the truck.</p> <p>20 The Ortega matter, I don't</p> <p>21 recall if the issue was -- I don't recall if</p> <p>22 the -- I don't recall if the issue was</p> <p>23 related -- part of the issue was related to</p> <p>24 whether or not Ortega was using his headlight</p>	<p style="text-align: right;">Page 44</p> <p>1 Electrolux North America. The next one is a</p> <p>2 product warnings case.</p> <p>3 Q. Tell me about Power, what was</p> <p>4 the issue in Power?</p> <p>5 A. It was the failure to provide</p> <p>6 adequate warning on a clothes dryer regarding</p> <p>7 a lint fire hazard associated with the design</p> <p>8 of the dryer.</p> <p>9 Q. And you were retained by whom?</p> <p>10 A. Looks like American Family</p> <p>11 Mutual Insurance Company.</p> <p>12 Q. What was your opinion?</p> <p>13 A. All of them?</p> <p>14 Q. Give me the thumbnail.</p> <p>15 A. That the manufacturer failed to</p> <p>16 provide adequate warning.</p> <p>17 Q. And what was your solution?</p> <p>18 A. The solution was to provide</p> <p>19 adequate warning.</p> <p>20 Q. In what method?</p> <p>21 A. In had to do both with the</p> <p>22 design of the product and the supplementation</p> <p>23 of that design with an on-product warning or</p> <p>24 the failure to provide a design solution</p>



<p style="text-align: right;">Page 45</p> <p>1 adding a warning to the product.  2 Q. Did that go to trial or is that  3 still active?  4 A. That one settled.  5 Q. Okay. What was the next one?  6 A. Next one is Royal Indemnity  7 Company vs. Crane Company, et al.  8 Q. Okay.  9 A. The next one is --  10 Q. Tell me about it.  11 A. That one was a product warning  12 case. I think that was fiber reinforced  13 plastic panels that were installed in an oven  14 room of a manufacturer of chicken nuggets, I  15 believe, food processor.  16 Q. And you were retained on behalf  17 of whom?  18 A. One of the insurance companies  19 for the company, the manufacturer or -- not  20 the manufacturer of the product, the  21 manufacturer of the chicken processor is  22 probably a good way to put it.  23 Q. Is your conclusion that  24 whatever warning was at issue was satisfactory</p>	<p style="text-align: right;">Page 47</p> <p>1 looking at product warnings or are we looking  2 for warnings in general?  3 Q. Looking for product warnings.  4 A. Okay. I'm counting 15. I  5 would say 15.  6 Q. Can you identify which ones?  7 A. Sure. So we did the two. The  8 next one is 5/12 Jessica Durkin v. Paccar,  9 Incorporated. The next one is also --  10 Q. Can you tell me what the  11 product was?  12 A. That was a bulkhead, aluminum  13 bulkhead, I believe it was an aluminum  14 bulkhead on a flatbed trailer.  15 Q. Okay.  16 A. The next one is also in May of  17 2012, Kleiman vs. Jay Peak, Incorporated.  18 Q. What was the product?  19 A. That was a gas fireplace.  20 Q. If I say generically, on the  21 Durkin case, you were retained on the side of  22 the Plaintiff?  23 A. Yes, I was retained on behalf  24 of the deceased Plaintiff, estate of.</p>
<p style="text-align: right;">Page 46</p> <p>1 or unsatisfactory?  2 A. I'm going to say they didn't  3 provide warning as to the fire hazard  4 associated with the use of the panels they  5 were selling with it. That was part of the  6 problem.  7 Q. What was the next case?  8 A. Jessica Durkin vs. Paccar,  9 Incorporated, et al.  10 Q. Are all of these -- would you  11 say all of these are warnings cases for  12 products?  13 A. No.  14 Q. Okay, go ahead. How many would  15 you say there are?  16 A. I can count them.  17 Q. Go ahead, why don't you count  18 them.  19 A. Do you want me to start from  20 the top or do you want me to count the ones we  21 already talked about?  22 Q. We got two. You can begin at  23 three.  24 A. Now, just to clarify, are we</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. The Kleiman case on behalf of  2 the Plaintiff?  3 A. Retained on behalf of the  4 Plaintiff's parents.  5 Q. Okay. What's next?  6 A. 10/2012, Mitchell Robinson, et  7 al. vs. YJ USA Corporation doing business as  8 JumpKing.  9 Q. Okay. What was the product?  10 A. That was a trampoline.  11 Q. And what was your -- were you  12 retained on behalf of the Plaintiff?  13 A. Yes.  14 Q. Okay. Next?  15 A. January 2013, it looks like  16 John and Emily McGrath vs. Rust-Oleum  17 Corporation.  18 Q. Product?  19 A. Yes.  20 Q. What type?  21 A. That I think that was a stain.  22 Q. Were you retained on behalf of  23 the Plaintiff?  24 A. Yes.</p>

<p style="text-align: right;">Page 49</p> <p>1 Q. Next, please.  2 A. Jacqueline Down and IDA Wescott  3 vs. USC.  4 Q. What was the product?  5 A. That was a pole vault mat.  6 Q. Okay. And were you retained  7 behalf of Plaintiffs?  8 A. Yes.  9 Q. Okay. What is next?  10 A. I think, I'm not a hundred  11 percent sure, but I think Megan Smith vs. In  12 Gear Fashions was a warnings case.  13 Q. What was the product?  14 A. It would be clothing. I don't  15 remember exactly what article of clothing.  16 Q. Were you retained on behalf of  17 the Plaintiff?  18 A. I'm going to guess yes.  19 Q. What would the next one be?  20 A. February 2004, Jesus Flores v.  21 Alexander Andrew, doing business as Fall  22 Tech.  23 Q. You said 2004, you meant 2014?  24 A. You're correct.</p>	<p style="text-align: right;">Page 51</p> <p>1 Q. Were you retained on behalf of  2 the Plaintiffs?  3 A. Yes.  4 Q. What would the next one be?  5 A. Virginia and Robert Nester v.  6 Textron, Incorporated.  7 Q. Okay. What was the product  8 involved?  9 A. That's a golf car.  10 Q. Golf cart?  11 A. Golf car.  12 Q. Car?  13 A. Car.  14 Q. Like you drive around on the  15 golf course?  16 A. Yes.  17 Q. Were you retained on behalf of  18 the Plaintiff?  19 A. Yes.  20 Q. What was the issue in that  21 case?  22 A. The issue was -- that I was  23 asked to address?  24 Q. Yes.</p>
<p style="text-align: right;">Page 50</p> <p>1 Q. What was the product?  2 A. That was a fall arrest system.  3 Q. Like a harness?  4 A. Well, it was the complete  5 system. I'm trying to think now if that  6 actually involved an on-product warning. So  7 we'll put that in the maybe category.  8 Q. Okay. Were you retained on  9 behalf of the Plaintiff?  10 A. Yes.  11 Q. Okay. What would the next one  12 be?  13 A. Next one that I see is March  14 2015, Member Select Insurance Company vs.  15 Electrolux Home Products and Sears.  16 Q. What was the product involved  17 in that?  18 A. That was a clothes dryer.  19 Q. What was the issue?  20 A. Multiple issues, but failure to  21 warn. Failure to provide adequate on-product  22 warning was one of the issues.  23 Q. Was that a dryer fire?  24 A. Yes, lint dryer fire.</p>	<p style="text-align: right;">Page 52</p> <p>1 A. The failure of the on-product  2 warning to effectively and adequately  3 communicate the risks that were involved with  4 the incident.  5 Q. What was the risk?  6 A. Inadvertent activation of the  7 golf cart.  8 Q. Okay. What was the next one?  9 A. The next one looks to be June  10 2016, Westfield Insurance vs. Modern Glass  11 Paint and Tile Company.  12 Q. What was the product about?  13 A. That may have been a stain as  14 well.  15 Q. Were you retained on behalf of  16 the Plaintiff?  17 A. Yes.  18 Q. What's the next?  19 A. August 2015, United Preferred  20 Insurance Company vs. Electrolux North  21 America.  22 Q. What was the product involved?  23 A. Clothes dryer.  24 Q. Lint fire?</p>



<p style="text-align: right;">Page 53</p> <p>1 A. Lint dryer fire, yes.  2 Q. Were you retained on behalf of  3 the Plaintiff?  4 A. Yes.  5 Q. What's next?  6 A. Kelvin and Krystle Carr vs.  7 Taylor Industries, LLC.  8 Q. What product was involved?  9 A. That was an oil well service  10 rig.  11 Q. Were you retained on behalf of  12 the Plaintiff?  13 A. Yes.  14 Q. Next one?  15 A. That's it.  16 Q. You had said 15, I counted 14.  17 A. Yes, I told you I thought it  18 was about 15.  19 Okay. Well, I'm not going to  20 cross-examine you on that. If I did, I don't  21 think I'd win the case.  22 Have you ever been precluded  23 from testifying by a Court?  24 A. Sure.</p>	<p style="text-align: right;">Page 55</p> <p>1 A. Well, I've had multiple Daubert  2 challenges that have been successfully  3 overcome in the last dozen years.  4 Q. I'm talking about the one that  5 you were precluded.  6 A. That one was either Connecticut  7 or New York.  8 Q. If New York, the Southern  9 District?  10 A. I don't remember whether it was  11 New York or Connecticut. I don't remember  12 which particular district.  13 Q. Have you been precluded any  14 other times?  15 A. The only other thing I can  16 remember was after -- I was in trial in  17 Florida State Court and the defense objected  18 to my testimony and the Judge had me go and  19 direct the Plaintiff outside the Jury's  20 purview, and then ruled afterwards that he  21 wasn't going to let any expert testify.  22 So, I think that would preclude  23 me from testifying. But I don't think it had  24 anything to do with my testimony. The Judge</p>
<p style="text-align: right;">Page 54</p> <p>1 Q. How often?  2 A. There are two Daubert  3 challenges where the Judge ruled that I would  4 not be allowed -- actually, one Daubert  5 challenge where they would not allow me to  6 testify in a case.  7 And then there was a case in  8 Virginia State Court where a Judge wouldn't  9 let me testify because she felt the state of  10 Virginia didn't recognize the field of or  11 science of human factors.  12 Q. Are either of those on your  13 Testimony List?  14 A. No.  15 Q. They preceded that or did you  16 not give testimony?  17 A. The Daubert case was 2004 where  18 the Judge ruled that the field of psychology  19 was nothing more than common sense.  20 Therefore, my opinions were beyond the  21 province of the Jury. The Virginia case was,  22 I'm going to say, around the 2010 time frame.  23 Q. What Federal Court was the  24 Daubert challenge?</p>	<p style="text-align: right;">Page 56</p> <p>1 felt it was a veracity issue between the  2 Plaintiff and Defendant, so he wasn't going to  3 let any expert testify.  4 Q. Any others?  5 A. Not that I can recall.  6 Q. Have you ever been -- have you  7 ever had any portion of your testimony  8 restricted going into trial by Daubert or any  9 other reason other than what you just told me?  10 A. I'm pretty sure my testimony is  11 always restricted to what my opinions are in  12 my field.  13 Q. Do you know what I mean by that  14 question?  15 A. You're saying that --  16 Q. Someone filed a Motion and said  17 I want to preclude him and the Judge precluded  18 some of it, but not all of it?  19 A. The only time -- if they were  20 the opinions I was planning on giving, the  21 Judge wouldn't let me give all them, the only  22 time I can remember was a Court in Maryland  23 involving a bicycle collision where the  24 bicyclist hit a defect in the sidewalk, and I</p>

<p style="text-align: right;">Page 57</p> <p>1 think the Judge only allowed me to testify on  2 certain -- or only provide certain opinions of  3 the substantive opinions that I planned to  4 give.  5 Q. Do you know why you were  6 restricted?  7 A. I don't know why.  8 Q. Well, do you know whether you  9 were restricted because your opinions were not  10 scientific?  11 A. I don't believe that my  12 opinions have ever been found to be not  13 scientific.  14 Q. Has any of your testimony, to  15 your knowledge, been stricken after you have  16 testified by a trial judge or subsequently on  17 appeal?  18 A. No.  19 ---  20 (Whereupon, a short break was taken at  21 this time.)  22 ---  23 THE WITNESS: I remembered  24 another Daubert challenge in Virginia State</p>	<p style="text-align: right;">Page 59</p> <p>1 about?  2 A. I believe so.  3 Q. What does that mean, what are  4 those articles?  5 A. Generally, it's an issue with  6 the way manufacturers provide information in  7 manuals. These were studies that looked  8 at -- they were for power tools, there were  9 multiple power tools and they were UL listed  10 power tools. And UL has a certain set of  11 requirements for warnings to be presented in  12 the literature for the particular product to  13 be UL certified.  14 The problem is that the  15 manufacturers are taking that list of warnings  16 and dropping them in within the order that UL  17 is providing.  18 Q. Do you mean sort of the  19 numerical order of the UL requirements?  20 A. No. UL has a list of warnings,  21 these warnings have to be in the literature,  22 and they just list them out. There's no real  23 reason or intention for -- on behalf of UL to  24 say this is the order in which you have to</p>
<p style="text-align: right;">Page 58</p> <p>1 Court where the Judge ruled that the hazard  2 was an act of God. Therefore, there was no  3 responsibility on behalf of the manufacturer  4 to provide a warning.  5 BY MR. HEINOLD:  6 Q. So someone filed a Daubert  7 Motion to preclude you and the Judge granted  8 that Motion because he said there was no need  9 for a warning because the event was an act of  10 God?  11 A. Mine and the other expert in  12 the case.  13 Q. Expert for Plaintiff or  14 Defendant?  15 A. Plaintiff, same side.  16 Q. I saw in your C.V. some various  17 publications that are references to what I'll  18 call ordering and prioritizing warnings and  19 product manuals?  20 A. Okay.  21 Q. Does that sound correct, my  22 general statement?  23 A. Sure.  24 Q. You recognize what I'm talking</p>	<p style="text-align: right;">Page 60</p> <p>1 present the warning. It's just these are the  2 list of warnings you have to present.  3 The problem with it is that a  4 lot of UL warnings are what we would consider  5 common sense, warnings that people would have  6 information on. So, for example, don't  7 submerge an electrical product into water,  8 that's a fairly well-known warning dealing  9 with electrical tools. So why should that be  10 first on the list.  11 Later on in the list and other  12 warnings that the manufacturer give that  13 product specific are lesser known hazards,  14 lesser known instructions, lesser known  15 information, and they tend to be populated at  16 the bottom of the list.  17 One of the things we know from  18 a warnings perspective is if you give people  19 warnings that they're well aware of at the  20 start of a list or at the start of a  21 publication they're going to stop reading it  22 because they're going to think that it's  23 information they already know or have or  24 self-evident and therefore, there's no reason</p>

<p style="text-align: right;">Page 61</p> <p>1 to spend the time reading through an entire  2 list of obvious information.  3 So if you want to get the user  4 to read and understand information that is  5 specific to your product or unique to your  6 product, you need to provide it higher in that  7 prioritization or make it more of a priority  8 in the way you're presenting it in the manual.  9 Q. Were there rules about that? I  10 mean, did you come to conclusions about how to  11 prioritize it?  12 A. There are conclusions in the  13 studies. Typically, I suggest in the study  14 that you put information that people are not  15 aware of, not open and obvious, not commonly  16 known first, present that information first so  17 the user will recognize that they're getting  18 information that they didn't know, information  19 that is important, that it's filling knowledge  20 gaps and that it's worthwhile to continue  21 reading.  22 Q. Those were studies that you  23 did?  24 A. Yes.</p>	<p style="text-align: right;">Page 63</p> <p>1 manuals. So those are one that are specific  2 to product manuals.  3 Q. Have you done any other  4 research on the issue of prioritizing warnings  5 on products?  6 A. On product, yes.  7 Q. What have you done for  8 prioritization on-product warnings?  9 A. What I've published under  10 Publications and Presentations is Page 7 would  11 be Vigilante Wogalter, The ordering of  12 over-the-counter pharmaceutical label  13 components.  14 Q. What year? Oh, I see, 1997,  15 The preferred order of over-the-counter  16 pharmaceutical label components?  17 A. Yes.  18 Q. Did that deal with on-product?  19 A. Yes.  20 Q. Only?  21 A. That was only on-product. The  22 information on that study was used by the FDA  23 when they redid their over-the-counter  24 labeling format requirements in 1999.</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. And you did those while at NC  2 State as a graduate student?  3 A. Yes.  4 Q. I didn't see any other  5 publications on that topic of prioritizing in  6 manuals, warnings in manuals, except for two,  7 1997, 1996. Did I miss any?  8 I mean, when I asked the  9 question about prioritization you went to  10 those studies.  11 A. The first two that are related  12 to the prioritization of warnings and product  13 manuals are Vigilante 1998 and Vigilante 1997,  14 and then should be a --  15 Q. Okay. That's on Page 6, 1998,  16 Product manual safety warnings effective  17 ordering?  18 A. Yes.  19 Q. And 1997, okay.  20 A. Okay. Then on the next page,  21 Vigilante, Wogalter 1997 on the prioritization  22 of safety warnings in product manuals. And  23 then there's Vigilante, Wogalter 1996,  24 Ordering of safety warnings in product</p>	<p style="text-align: right;">Page 64</p> <p>1 Q. When you talk about on-product  2 on over-the-counter pharmaceuticals, are you  3 talking about on the package?  4 A. On the container of the, for  5 example, medication pills or tablets or  6 whatever, your aspirin bottle or your Tylenol  7 bottle or what have you.  8 Q. What conclusions did you reach  9 there?  10 A. Well, the conclusions that I  11 reached was the way medication label --  12 over-the-counter medication labeling was  13 presented, the information was presented was  14 with information that the user, the end user  15 didn't care about, couldn't understand, didn't  16 need.  17 So it gets into the problem,  18 again, where you're presenting information  19 that's irrelevant or not understandable to the  20 consumer and preventing them from getting the  21 information that they need which is buried  22 further in the label.  23 So if you put the information  24 the user needs up front, like, for example,</p>

<p style="text-align: right;">Page 65</p> <p>1 directions and contraindications, the user  2 doesn't have to go searching for it. They're  3 more likely to see it and they're more likely  4 to read it.  5 Q. So, for example, a bottle of  6 aspirin, you're talking about putting it on  7 the bottle?  8 A. Yes.  9 Q. Not the box, not the inserts?  10 A. Well, I think the requirements  11 for the box and the insert -- excuse me, the  12 box and the bottle are the same because a lot  13 of medications, over-the-counter medications  14 are sold just in a container, not a box,  15 although some are sold in the box, the  16 container in the box.  17 Q. All right. I read your report,  18 you listed the things that you reviewed and  19 relied on. Is there anything that you didn't  20 list that you reviewed or relied on?  21 A. As far as discovery material, I  22 list everything in here that I reviewed for  23 this case. As far as specific references used  24 to support my opinions, I provided them in</p>	<p style="text-align: right;">Page 67</p> <p>1 Q. It's kind of hard for me to  2 question you about it if it's on the thumb  3 drive.  4 A. The other stuff I did bring  5 hard copies so we can look at it here.  6 Q. Extra hard copies?  7 A. Not extra ones. Just one copy.  8 MR. LEVINE: I can make  9 copies.  10 BY MR. HEINOLD:  11 Q. Of what? What did you bring?  12 A. So, for example --  13 Q. Of the things that are on  14 there?  15 A. -- I brought some printouts  16 from websites dealing with winterization of  17 motorcycles, overheating of air-cooled  18 engines, water-cooled engines, et cetera. And  19 then I brought several photographs of  20 different motorcycles. One is a Yamaha YZF,  21 1998, depicting the oil sight glass on the  22 right side of the engine so that when it's on  23 its kickstand the oil doesn't cover the oil  24 sight glass like it does on the incident</p>
<p style="text-align: right;">Page 66</p> <p>1 Section G.  2 Other things that I'm relying  3 upon are my education, experience and  4 training. And then I did bring some  5 additional photographs that I did not provide  6 in the report. And I did have a couple other  7 websites that I had looked at, downloaded  8 prior to writing my report that I didn't  9 reference specifically in the report.  10 Q. So is this something you can  11 provide me?  12 A. Sure.  13 Q. That I can see it, or are you  14 going to tell me I have to write it down?  15 A. Do you want to see it now or  16 you want it later?  17 Q. I don't know what they are.  18 A. Sure.  19 Q. I mean, we can do it later.  20 A. I provided my entire file on  21 the thumb drive. It's my understanding you  22 wanted a copy of my entire file.  23 Q. Oh, here (indicating)?  24 A. Yes, it's yours to take home.</p>	<p style="text-align: right;">Page 68</p> <p>1 bike.  2 I also photographed warnings  3 that are on the bottom of that motorcycle. As  4 I'm sure one of the things you've asked about  5 was -- for instance, the propensity of  6 likelihood of the manufacturers to put  7 warnings directly on the body of the  8 motorcycle.  9 So here's an example of the  10 Yamaha putting a warning sticker right on the  11 fuel tank above the Yamaha YZF sport bike and  12 a warning on the windshield front fairing of  13 the bike.  14 Then I brought a photograph of  15 a BMW, 2010 BMW F800 GS showing the dipstick  16 on the left side of the crank case in a  17 similar position, although not exact, same  18 position as the oil sight glass on the  19 incident bike.  20 And then I provided just an  21 article from American Motorcyclist in 2007  22 that categorizes the Yamaha YZF and the  23 BMW R1150 R sports bike. So they're in the  24 same category as opposed to my</p>

<p style="text-align: right;">Page 69</p> <p>1 Harley-Davidson, which is a different category  2 of bike.  3 And then I brought photographs  4 of the control panel console and the steering  5 head of an R1150 R BMW motorcycle and an  6 R1100rsl motorcycle.  7 In my report I discuss  8 alternatives to place the warning on the bike,  9 and I wanted to bring photographs to show the  10 area I was talking about so we are clear and  11 on the same page as to what I was referring to  12 in the report.  13 Q. Is all of this information that  14 you just generalized for me here something you  15 had prior to writing your report?  16 A. I had everything except for the  17 photographs of the Yamaha YZF and photographs  18 of the F800 GS. Just to clarify, I did see  19 both bikes in person prior to writing my  20 report. I didn't photograph them until after  21 writing my report.  22 Q. Okay. Why did you not include  23 those in your report?  24 A. I didn't think it was necessary</p>	<p style="text-align: right;">Page 71</p> <p>1 Q. Other than those additional  2 things, is there anything else in your report  3 that you reviewed or relied for purposes of  4 this case? I'm sorry, that you reviewed or  5 relied on?  6 A. The only additional work I did  7 was review the report of -- I think his name  8 was Mr. Breen?  9 Q. Yes.  10 A. So I think that's the only  11 additional thing I did other than prepare for  12 the deposition.  13 Q. And does the list of the things  14 you reviewed and the report fairly depict all  15 work that you've done to perform -- to prepare  16 your report in this case and reach your  17 opinions?  18 A. I'm not quite sure I understand  19 that.  20 Q. Okay. Tell me what you did to  21 prepare your report. I don't mean sit down  22 and prepare your report, but I mean from the  23 time you were retained in this case -- when  24 were you retained, by the way?</p>
<p style="text-align: right;">Page 70</p> <p>1 at the time.  2 Q. Why do you think it's necessary  3 now?  4 A. Because I knew you would ask me  5 about everything I looked at and I tried to  6 make sure my file was complete as possible.  7 Q. Did you think when you were  8 writing your report I wasn't going to ask you  9 that?  10 A. Typically when I write my  11 report I write it to express my opinions and  12 support my opinions. When I get ready for a  13 deposition I try to anticipate what's going to  14 be asked or required by the opposing attorney.  15 MR. HEINOLD: I would like to  16 get copies of those, Ken. You don't have to  17 do it this minute. You can do it when we take  18 a break.  19 MR. LEVINE: Okay, next break  20 I'll send it out for colored copies.  21 MR. HEINOLD: I am going to  22 want to ask him about that. Having not seen  23 them I'm at a disadvantage at this moment.  24 BY MR. HEINOLD:</p>	<p style="text-align: right;">Page 72</p> <p>1 A. I was officially retained in  2 October of 2015. I should say Vigilante  3 Forensic was retained in I think October of  4 2015. I may have been retained prior than  5 October 2015 when I was with my prior  6 company. I don't have the file from my prior  7 company because I left. So I don't have the  8 inquiry sheet, if it was created before then.  9 Q. Do you have a list of the  10 activities you performed in this case?  11 A. I don't have a list of  12 activities, per se. But typically my reports  13 are written in the way that I can go through  14 the file.  15 So, for example, I'll start  16 with a brief understanding of the issue, and  17 then I'll discuss a purpose to my  18 investigation. That is the hypothesis I want  19 to test, and then I'm provided with the  20 discovery material that's available. I'll go  21 through that material to get a better  22 understanding of the product, of the issue  23 relevant to my purpose, and I'll go through  24 the information to determine what happened and</p>



<p style="text-align: right;">Page 73</p> <p>1 how it happened.</p> <p>2 So, for example, Mr. Yazdani's</p> <p>3 testimony as to what he did, why he did, how</p> <p>4 he did it. And then I go through my analysis,</p> <p>5 and in going through my analysis I incorporate</p> <p>6 my education, training and experience to</p> <p>7 determine and test my hypothesis.</p> <p>8 So the first thing I addressed</p> <p>9 was did BMW provide adequate warning? My</p> <p>10 analysis goes through the steps on how I came</p> <p>11 to my conclusions that they failed to provide</p> <p>12 adequate warning. Then the next thing I did</p> <p>13 was looked at whether BMW North America was</p> <p>14 aware of the need to provide on-product</p> <p>15 warning.</p> <p>16 Q. I seen your report. We don't</p> <p>17 have to go through it.</p> <p>18 I'm interested in, for example,</p> <p>19 you mentioned that you inspected some other</p> <p>20 vehicle, some other motorcycles?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And in your report you</p> <p>23 say you may use as Exhibits as photos --</p> <p>24 looking at Page 2, photos of the incident</p>	<p style="text-align: right;">Page 75</p> <p>1 background in I guess design, development and</p> <p>2 testing of motorcycles.</p> <p>3 Q. And what did you ask?</p> <p>4 A. We talked about my experiences</p> <p>5 and his experiences. We talked a little bit</p> <p>6 about the use of oil sight glasses in bikes,</p> <p>7 his experience with them, my experience with</p> <p>8 them. Just kind of generalities.</p> <p>9 Q. Did he give you any information</p> <p>10 you thought useful?</p> <p>11 A. Yeah, I don't think that he</p> <p>12 told me anything I didn't know.</p> <p>13 Q. Where is he?</p> <p>14 A. He's located in Ohio.</p> <p>15 Q. You went out there?</p> <p>16 A. Well, I was out there for</p> <p>17 another case that he and I were investigating.</p> <p>18 Q. Where in Ohio?</p> <p>19 A. He's outside of Columbus.</p> <p>20 Q. Does he operate a business?</p> <p>21 A. Yes.</p> <p>22 Q. What's the name of his</p> <p>23 business?</p> <p>24 A. 830 Engineering.</p>
<p style="text-align: right;">Page 74</p> <p>1 motorcycle and exemplar motorcycle. You</p> <p>2 didn't say that you had looked at other</p> <p>3 motorcycles.</p> <p>4 A. I'm sorry?</p> <p>5 Q. So I'm wondering what other</p> <p>6 activities that you conducted prior to</p> <p>7 authoring your report?</p> <p>8 A. Well, I did --</p> <p>9 Q. You reviewed the material that</p> <p>10 you said was available?</p> <p>11 A. Yes.</p> <p>12 Q. What else?</p> <p>13 A. I looked at the websites to get</p> <p>14 information on issues that are relevant. I</p> <p>15 looked at my motorcycle manual. I looked at</p> <p>16 my motorcycle. I talked to a friend of mine</p> <p>17 that is an expert in motorcycles. And when I</p> <p>18 was at his place back in October I looked at</p> <p>19 his bikes which are the photographs that I</p> <p>20 took later on.</p> <p>21 Q. Who is that person?</p> <p>22 A. Erin Higinbotham.</p> <p>23 Q. And you say he is? What is he?</p> <p>24 A. Well, he's an engineer with a</p>	<p style="text-align: right;">Page 76</p> <p>1 Q. 8-3-0?</p> <p>2 A. Correct.</p> <p>3 Q. What town?</p> <p>4 A. I'm going to say Milford</p> <p>5 Center.</p> <p>6 Q. I'm sorry, I interrupted your</p> <p>7 answer to ask that question. Go ahead.</p> <p>8 A. I don't know where I was. I</p> <p>9 kind of lost track.</p> <p>10 MR. HEINOLD: Do you want to</p> <p>11 read it back.</p> <p>12 - - -</p> <p>13 (Whereupon, the court reporter read the</p> <p>14 pertinent information.)</p> <p>15 - - -</p> <p>16 THE WITNESS: Okay, so I did</p> <p>17 that. I did look at the websites, and I don't</p> <p>18 recall if I asked friends that are</p> <p>19 motorcyclists their understanding of the</p> <p>20 potential -- if they understood that there was</p> <p>21 a potential fire hazard associated with</p> <p>22 leaving their bike idling, what their</p> <p>23 practices were with respect to leaving it</p> <p>24 idle. I just don't recall specific instances,</p>

<p style="text-align: right;">Page 77</p> <p>1 but it's possible that I did.  2 BY MR. HEINOLD:  3 Q. You may have talked to some of  4 your friends?  5 A. Sure.  6 Q. Or you did?  7 A. I'm saying I may have because I  8 typically -- because typically if I'm involved  9 in a case that is either a common product or a  10 product that has a -- people that I knew that  11 you used them, you know, I'll talk to them  12 about my case and explain a little bit about  13 it, kind of get their feedback on what their  14 practices and knowledge were. Just kind of a  15 general research, if you will, not something  16 that I'm specifically relying upon for my  17 opinions. Just kind of general background.  18 Q. Anything else?  19 A. I think that would be it.  20 Q. On Page 6 of your report --  21 wait a minute, Page 5 of your report, Section  22 E, talking about providing an adequate  23 warning.  24 MR. LEVINE: Off the record a</p>	<p style="text-align: right;">Page 79</p> <p>1 understanding the design decisions and choices  2 that were available or made.  3 Q. Okay. Well, I understand, for  4 example, the product hierarchy, there is a  5 design and you should try to design out the  6 hazard. If you can't, then you offer a  7 warning. They're two separate issues.  8 A. Well, they're not separate  9 issues.  10 Q. Well, let me just finish. I  11 understand that the design issue is a  12 predicate for the warning, right?  13 A. Yes. So the design of the BMW  14 creates a potential for a hazardous situation,  15 that is the potential for fire. There was  16 choices that BMW made in the design of the  17 bike that could have eliminated that  18 potential. They chose not to. If they're  19 going to not eliminate through design, they  20 have the option of safeguarding it.  21 I think that Mike Zazula  22 addressed some of those issues guarding it  23 with the use of the optional police fan kit.  24 I don't recall offhand if he had an issue with</p>
<p style="text-align: right;">Page 78</p> <p>1 second.  2 ---  3 (Whereupon, a discussion was held off  4 the record.)  5 ---  6 BY MR. HEINOLD:  7 Q. The warning that you cite in  8 the manual you talk about Mr. Yeldham's  9 testimony and you talk about Mr. Zazula's  10 report in the next paragraph.  11 A. Okay.  12 Q. Now, I had asked you about the  13 scope of your expertise as a motorcycle design  14 expert, you said -- your Counsel said you're  15 going to be sticking within your report.  16 Are your references here to  17 those things references to the need for a  18 warning as compared to a criticism of the  19 design other than a warning?  20 A. Yes. So my opinions are  21 both. So the need for a warning is dependent  22 upon the design choice that BMW made or BMW  23 North America made. So you can't have  24 opinions with respect to warnings without</p>	<p style="text-align: right;">Page 80</p> <p>1 respect to the monitoring of the engine  2 temperature, potential shutting it down if it  3 got too hot. But certainly, those are  4 guarding solutions that were available to BMW  5 to my understanding and they chose not to do  6 that.  7 And then so they relied upon a  8 warning as their mitigation strategy. And my  9 opinion is that reliance on that warning was  10 inappropriate in that the warning they  11 provided was inadequate. And that if they  12 were going to rely upon the warning, solely  13 upon the warning, they needed to provide it on  14 the motorcycle itself like they did with the  15 recall motorcycle a few years prior because of  16 the unique characteristic of the potential  17 fire hazard with the design of this bike.  18 Q. I understand that. My question  19 is: Are you going to criticize the design as  20 a design? Are you going to say the  21 motorcycle -- forget the warnings. Are you  22 going to say I'm the motorcycle expert and  23 this motorcycle is defective because it had a  24 sight glass in this location and I'm offering</p>



<p style="text-align: right;">Page 81</p> <p>1 an alternative?</p> <p>2 A. No. My opinion is that because</p> <p>3 of the way they designed it, they created a</p> <p>4 potential fire hazard, and as such they had a</p> <p>5 responsibility to mitigate that, and they</p> <p>6 could have mitigated it through design or</p> <p>7 guarding. If they weren't doing to do that,</p> <p>8 they should have at least provide adequate</p> <p>9 warning, and the warning that they did chose</p> <p>10 to provide was inappropriate and inadequate.</p> <p>11 Q. Are you offering an opinion</p> <p>12 that the design of the motorcycle beyond the</p> <p>13 warning is defective and unsafe?</p> <p>14 A. I think that they were --</p> <p>15 excuse me, I think that they already</p> <p>16 established that. I'm not establishing the</p> <p>17 fact that oil sight glass or its position in</p> <p>18 its composition failed meeting to a</p> <p>19 catastrophic event. That's why I'm citing</p> <p>20 Mark Yeldham, his testimony, to establish</p> <p>21 that.</p> <p>22 So I'm not planning on</p> <p>23 establishing that on my own. I'm using his</p> <p>24 testimony to establish that there was a hazard</p>	<p style="text-align: right;">Page 83</p> <p>1 MR. LEVINE: Oh, okay.</p> <p>2 MR. HEINOLD: I'm with you a</p> <p>3 hundred percent. There's a warning that says</p> <p>4 here's a hazard, don't do this, and that's</p> <p>5 what we're here about.</p> <p>6 But your last statement that</p> <p>7 he's going to say if you had a different</p> <p>8 design you wouldn't have the hazard, he</p> <p>9 doesn't have that in his report. And if you</p> <p>10 are going to declare him to be a motorcycle</p> <p>11 design expert, then we'll see if he</p> <p>12 qualifies. But that is the next step.</p> <p>13 MR. LEVINE: The part that you</p> <p>14 don't agree with me on, let me just address</p> <p>15 that just for a second, I'm rather confident</p> <p>16 that your own client who designed the bike</p> <p>17 would say that if designed differently, as</p> <p>18 some other vehicles are designed, that that</p> <p>19 precise hazard would not exist. It's just a</p> <p>20 nature of the design of that particular bike.</p> <p>21 So I don't think it requires</p> <p>22 him to be an expert, although he probably has</p> <p>23 enough of that expertise to say that</p> <p>24 statement, that if it was designed differently</p>
<p style="text-align: right;">Page 82</p> <p>1 due to the design of this bike.</p> <p>2 Q. Okay.</p> <p>3 MR. HEINOLD: Ken, do you</p> <p>4 understand my question?</p> <p>5 MR. LEVINE: I do. I think</p> <p>6 that you're asking him to disconnect</p> <p>7 something -- let me start off, you can keep</p> <p>8 this on the record. Inevitably he has to say</p> <p>9 that the design resulted in a hazard. I don't</p> <p>10 think that he is opining that personally other</p> <p>11 than through the acceptance of statements by</p> <p>12 folks at BMW and other experts that such a</p> <p>13 hazard simply exists based on it.</p> <p>14 I don't think he's going to</p> <p>15 come in, and correct me if I'm wrong, and</p> <p>16 testify that the design in and of itself</p> <p>17 should have been different. But he will say</p> <p>18 the obvious, which he's already stated, that</p> <p>19 if it did not have that design it would not</p> <p>20 have that hazard.</p> <p>21 So you're asking him is he an</p> <p>22 expert in that area?</p> <p>23 MR. HEINOLD: See, I don't know</p> <p>24 that I can agree with your last statement.</p>	<p style="text-align: right;">Page 84</p> <p>1 it would not have that hazard. I doubt your</p> <p>2 client or you when you pause for a second</p> <p>3 would disagree with that statement. So that's</p> <p>4 all that he would be saying, I believe, and he</p> <p>5 can answer for himself.</p> <p>6 So when you say is he a</p> <p>7 motorcycle expert as to the design or whether</p> <p>8 or not the design generated that hazard, I</p> <p>9 believe that everybody involved knows that the</p> <p>10 design generated that hazard. So I'm not</p> <p>11 sure -- I'll be happy to continue.</p> <p>12 MR. HEINOLD: I will say this,</p> <p>13 I don't disagree with you that it has a design</p> <p>14 and that design can lead to the consequences</p> <p>15 of a fire if you leave it idling at</p> <p>16 standstill, because there's a hazard</p> <p>17 recognized and a warning in the manual to that</p> <p>18 effect.</p> <p>19 MR. LEVINE: Then a safety</p> <p>20 engineer or an ergonomic expert will</p> <p>21 inevitably say every single time you've got</p> <p>22 this hazard that I've been asked to address,</p> <p>23 but that integral with that opinion is the</p> <p>24 straightforward statement that if it had been</p>

<p style="text-align: right;">Page 85</p> <p>1 designed differently, it's not the case with  2 all products, but if it was designed  3 differently it would not have that hazard.  4 MR. HEINOLD: And what's the  5 different design he's going to say it should  6 be?  7 MR. LEVINE: Oh, he's not going  8 to say it should be because there's six  9 million ways to build a motorcycle, and some  10 of them will have that hazard, some of them  11 will not have that hazard based on their  12 design.  13 I think that -- again, I  14 welcome his contribution to the conversation,  15 but I think his opinion is that when a  16 motorcycle is designed in this fashion, if the  17 manufacturer chooses to allow this hazard to  18 exist, because the nature of the design of  19 this motorcycle, not unlike every other  20 motorcycle, but the design of this type of  21 motorcycle generates this hazard, and once  22 they decided to have that design, which would  23 generate this known hazard, then they must do  24 X, Y and Z, but they are not guiltless --</p>	<p style="text-align: right;">Page 87</p> <p>1 if he has opinions with regard to other  2 designs that would not generate the hazard.  3 You can ask him whatever  4 questions you'd like to ask him. I've tried  5 to answer I think the conflict between you as  6 best I can.  7 MR. HEINOLD: Well, I think  8 your position tries to turn him into a design  9 expert, which he doesn't have in his report.  10 MR. LEVINE: I think the scope  11 of his opinions that he will say at trial with  12 regard to design and hazard generation as a  13 result of this design are stated in his  14 opinion and will be the testimony at the time  15 of trial.  16 But if you want to explore  17 that, if you feel as if he's going to give  18 testimony at trial beyond the scope of his  19 abilities or the scope of his report, I  20 certainly appreciate that, and an issue will  21 arise that we're going to have to address.  22 But I think that your questions may eliminate  23 that concern.  24 BY MR. HEINOLD:</p>
<p style="text-align: right;">Page 86</p> <p>1 that's a horrible lawyer word that I'm using.  2 They're not guiltless deciding, all right,  3 we're going to design it to allow this hazard  4 to exist.  5 MR. HEINOLD: You have an  6 expert who has addressed the design issues.  7 MR. LEVINE: Yes, we have.  8 MR. HEINOLD: And this witness  9 has addressed the warning issues given the  10 design.  11 MR. LEVINE: You have just  12 limited, frankly, the scope of his testimony.  13 He was asked to analyze the safety. You want  14 to say he was asked to analyze the warning. I  15 think any ergonomic expert is going to be  16 asked to analyze the safety. Integral to that  17 is a review as to the hazard and what causes  18 them, first and foremost, and that inevitably  19 goes back to the design.  20 So it would be impossible for  21 him to say I'm analyzing the safety that led  22 to fire, that he did not look at the design,  23 the design options and whether or not they  24 created a hazard. I don't -- you can ask him</p>	<p style="text-align: right;">Page 88</p> <p>1 Q. Do you consider yourself a  2 motorcycle design expert?  3 A. It depends on the specific  4 topic.  5 Q. How about on the location of  6 sight glasses, are you an expert in the  7 location and use of sight glasses for oil  8 systems?  9 A. It depends on the question. So  10 maybe I can short circuit this. I do not plan  11 on providing an alternative design solution.  12 So I would leave that to Zazula and Yeldham  13 and anybody else that testifies.  14 My opinion is simply that it's  15 my understanding that bikes that are designed  16 differently don't have this hazard. If you're  17 going to choose this design that creates this  18 hazard you need to A, accept that you're doing  19 it, and then B, think about providing a  20 different design.  21 If you can't provide a  22 different design for whatever reason, you have  23 to decide whether or not you're going to  24 provide a safeguard to prevent the hazard from</p>

<p style="text-align: right;">Page 89</p> <p>1 occurring that is inherit in your design. And  2 if you're not going to do that, then you need  3 to provide an adequate warning.  4 My opinion is that instead of  5 providing a design that doesn't create the  6 hazard, BMW, for whatever reason, I don't know  7 for whatever reason, given the hazard, chose  8 to leave it in the design of the bike. They  9 didn't provide a safeguard to prevent the  10 hazard from occurring.  11 It would be my opinion if asked  12 that it's unreasonable if the safeguard is  13 available and feasible, I didn't do the  14 analysis of what they should be, that's for  15 Mike Zazula to determine, but my opinion is  16 simply that if it's available and it's  17 feasible, it should have been used rather than  18 relying upon a third option. If they have a  19 hazard because of the design and they're not  20 going to safeguard it, the least they can do  21 is provide adequate warning.  22 My opinion in this case is that  23 they failed to provide adequate warning. If  24 they're going to solely on the warning, what</p>	<p style="text-align: right;">Page 91</p> <p>1 A. The Owner Manual does attempt  2 to address it.  3 Q. Okay. I'm not trying to say  4 there isn't a hazard. I'm acknowledging that  5 what has been said about what can occur if the  6 operator does certain things can occur, and  7 there's a warning about that. I'm not arguing  8 the merits of the warning. I'm saying it's  9 there, so therefore the characteristic is  10 known.  11 You're going to say, as I  12 understand it, that if you have that  13 characteristic the first thing you should do  14 is --  15 MR. LEVINE: Consider.  16 BY MR. HEINOLD:  17 Q. -- to consider is to have a  18 design that doesn't present that  19 characteristic. That you're going to leave  20 that fight to other experts; correct?  21 A. Yes, I'm going to leave -- I'm  22 not offering a design solution. But the  23 problem is that the design of the bike is  24 unique in that it creates a fire hazard that</p>
<p style="text-align: right;">Page 90</p> <p>1 they needed to do was to put it on the bike  2 like they did in the recall back in the early  3 models.  4 Q. So if I understand what you're  5 saying, you're not going to offer any type of  6 alternate design; correct?  7 A. I'm not planning on offering  8 alternative design.  9 Q. You're not planning on  10 criticizing any specific aspect of this  11 design?  12 A. The only thing I would limit my  13 opinion to or plan on providing an opinion is  14 that I've given alternative designs, they  15 should have been the first choice of  16 manufacturers as opposed to choosing a design  17 they had an inherent hazard.  18 Q. But that's going to be a  19 general statement --  20 A. Yes.  21 Q. -- about this motorcycle has  22 features and characteristics that lead to a  23 hazard that the Owner's Manual addresses;  24 correct?</p>	<p style="text-align: right;">Page 92</p> <p>1 doesn't exist on other types of bikes. And it  2 exists because of the design of the bike.  3 Whether it's the location  4 and/or the material or the manner in which the  5 oil sight glass was manufactured and mounted,  6 I don't know whether it's one or the other or  7 a combination of all three. But the design of  8 this bike creates a unique hazard to this bike  9 that does not occur or exist in my  10 Harley-Davidson, does not occur or exist in  11 the Yamaha bike that Mr. Yazdani had for 20  12 years prior to the BMW.  13 Q. Is that opinion -- or excuse  14 me, in that statement are you planning to talk  15 about the specifics of the design in saying  16 the characteristics of this bike create a  17 hazard of fire? Are you going to say and  18 here's what they are?  19 A. I'm going to say that Mr.  20 Yeldham testified that the design of this bike  21 and the designed oil sight glass creates a  22 fire hazard.  23 Q. I don't think he testified as  24 to that.</p>

<p style="text-align: right;">Page 93</p> <p>1 A. Sure he did.  2 Q. What did he say?  3 A. Mr. Yeldham testified that if  4 BMW R 1150 R motorcycle is left idling in a  5 stationary position the oil sight glass cover  6 can fail and cause a fire.  7 Q. That's the extent of what  8 you're going to talk about there?  9 A. I mean, he goes on. I'm citing  10 the rest of that paragraph as to why this is a  11 problem. I mean, he's acknowledging in that  12 testimony that there is a hazard associated  13 with the oil sight glass cover. And if you  14 don't have the oil sight glass cover it can't  15 fail, and if you have a dipstick you don't  16 have an oil sight glass cover. And therefore,  17 from the oil sight glass cover can't fail.  18 Q. Okay. So are you going to  19 offer an opinion about it should have had a  20 dipstick?  21 A. No, I am not, but my opinions  22 because of the unique characteristics of this  23 bike users don't understand or appreciate it  24 because it's abnormal, atypical due to the</p>	<p style="text-align: right;">Page 95</p> <p>1 sight glass, but it's on the right side of the  2 crank case that when it's on its left  3 kickstand the oil isn't covering the oil sight  4 glass.  5 And Mark Yeldham testified that  6 part of the reason why the oil sight glass may  7 fail is because when its on its left kickstand  8 the oil, hot oil covers the oil sight glass.  9 So to me intuitively that means that if it's  10 on the right side and it's not covering the  11 oil sight glass it can't cause it to fail in  12 that manner.  13 Q. Are you planning to offer the  14 opinion that the oil sight glass on this  15 motorcycle should have been on the right side,  16 not the left?  17 A. I do not plan on providing an  18 alternative design to this bike.  19 Q. And I think we've already  20 agree, but I want to be clear, you're not  21 planning on design that says there should be a  22 dipstick instead of an oil sight glass?  23 A. I was not planning on offering  24 an opinion with respect to alternative design.</p>
<p style="text-align: right;">Page 94</p> <p>1 unique or due to the design of this bike.  2 Q. Is there anything else that you  3 consider abnormal or unique?  4 A. Other than the fact that the  5 oil sight glass cover can fail and cause a  6 fire, that's the only thing that's relevant to  7 this incident.  8 Q. Are you aware of any --  9 A. Well, I take that back, because  10 apparently to prevent the fire due to the  11 design BMW wants you to ride away immediately  12 and that, again, is a unique or atypical trait  13 associated with this bike.  14 Q. Anything else?  15 A. Not that I can think of at the  16 moment.  17 Q. Have you done a survey on  18 motorcycles?  19 A. I've not surveyed every  20 motorcycle ever available, but I've looked at  21 a lot of bikes over a lot of years and most of  22 them have dipsticks.  23 Q. Any that don't other than BMW?  24 A. Well, the Yamaha has an oil</p>	<p style="text-align: right;">Page 96</p> <p>1 MR. LEVINE: I'm compelled to  2 step in. He has said a number of times that  3 he does not intend to present alternative  4 design. I just want to clarify that in one  5 way. Some people view warnings provided on a  6 product as an alternative design. I just  7 wanted to mention that so there's no lack of  8 clarity.  9 And I would ask that we pause  10 so I can go do and get those menus.  11 MR. HEINOLD: Can I just finish  12 this?  13 MR. LEVINE: Sure.  14 MR. HEINOLD: And I understand  15 what you say about the warning issuing  16 wasn't -- that's not a problem. I didn't take  17 it that way.  18 MR. LEVINE: Okay.  19 MR. HEINOLD: We do have a  20 report full of --  21 MR. LEVINE: Of warning  22 issues.  23 MR. HEINOLD: Of warning  24 issues.</p>

<p style="text-align: right;">Page 97</p> <p>1 BY MR. HEINOLD:</p> <p>2 Q. Do you plan -- I want to create</p> <p>3 a distinction between pointing out</p> <p>4 characteristics that others have identified,</p> <p>5 BMW and Mr. Zazula, and you personally</p> <p>6 criticizing them yourself, do you plan on</p> <p>7 criticizing the design, not the warning</p> <p>8 issues, the design of this motorcycle or</p> <p>9 simply point out based on what others have</p> <p>10 said that these characteristics lead to this</p> <p>11 hazard and either should be prevented or a</p> <p>12 better warning, here's what I think is a</p> <p>13 better warning?</p> <p>14 A. I think the best way to answer</p> <p>15 is that I'm relying on Yeldham and Zazula and</p> <p>16 others to identify the hazard associated with</p> <p>17 this bike and understanding why that hazard</p> <p>18 occurs with respect to design. I'm not</p> <p>19 offering an alternative design solution.</p> <p>20 If one is presented to me, I</p> <p>21 can have opinions with regard to whether or</p> <p>22 not that would be the appropriate thing to</p> <p>23 do. So that gets back into this design work.</p> <p>24 As an ergonomist and product safety expert,</p>	<p style="text-align: right;">Page 99</p> <p>1 only appropriate, but the correct thing to do.</p> <p>2 Q. Okay.</p> <p>3 - - -</p> <p>4 (Whereupon, a short break was taken at</p> <p>5 this time.)</p> <p>6 - - -</p> <p>7 BY MR. HEINOLD:</p> <p>8 Q. Okay, I think I get it. You</p> <p>9 said that this design is unique. Is it your</p> <p>10 understanding that the BMW air-cooled</p> <p>11 motorcycles are the only motorcycles capable</p> <p>12 of fire if the customer leaves it idling for</p> <p>13 an extended period at a standstill?</p> <p>14 A. Yeah, I'm not aware of any</p> <p>15 other motorcycles that have the same potential</p> <p>16 fire risk due to the same issue.</p> <p>17 Q. Did you research that?</p> <p>18 A. I did not research it.</p> <p>19 Q. So you can't point me to any</p> <p>20 source, literature or anything that says that,</p> <p>21 to support your understanding; it's just your</p> <p>22 understanding?</p> <p>23 A. Well, I should take that back.</p> <p>24 Part of the research I did was look at the</p>
<p style="text-align: right;">Page 98</p> <p>1 it's my opinion that if an alternative design</p> <p>2 exists that's feasible that eliminates the</p> <p>3 hazard, that is the appropriate thing to do.</p> <p>4 So, if someone presents it,</p> <p>5 whether it's you or Mr. Hughes, at the time of</p> <p>6 trial, I'm asked that question, that would be</p> <p>7 my opinion. I'm not going to opine what the</p> <p>8 alternative should be or the pros and cons of</p> <p>9 it or how, you know -- because I don't know.</p> <p>10 For example, they could have</p> <p>11 used a different glass that doesn't deform at</p> <p>12 329 degrees. Maybe that solves the problem.</p> <p>13 I'll leave that to, you know, someone else to</p> <p>14 determine that. If they use a dipstick</p> <p>15 instead of the sight glass maybe that fixes</p> <p>16 the problem. I'll leave that to somebody else</p> <p>17 to determine.</p> <p>18 If you put it on the right</p> <p>19 side, if they could have put it on the right</p> <p>20 side, does that alleviate the problem, I'll</p> <p>21 let someone else determine that.</p> <p>22 But if there is a design</p> <p>23 solution that eliminates the hazard, it's my</p> <p>24 opinion that would have been appropriate. Not</p>	<p style="text-align: right;">Page 100</p> <p>1 manuals for other motorcycles to see what they</p> <p>2 identify as hazards associated with their</p> <p>3 bikes. Like I said, I went through the Yamaha</p> <p>4 manuals and the Harley manuals and it wasn't</p> <p>5 identified as being a hazard with those bikes,</p> <p>6 in the design of those bikes.</p> <p>7 I'm not aware of it through my</p> <p>8 experience as being an issue with most bikes.</p> <p>9 This was the first time I became aware that it</p> <p>10 was an issue with any bike. And certainly, I</p> <p>11 understand that there could be fires if a</p> <p>12 motorcycle is left idling near combustibles.</p> <p>13 So certainly that was something that I</p> <p>14 understood, but not that a component on the</p> <p>15 bike would fail and lead hot oil to escape the</p> <p>16 engine and ignite and start a fire.</p> <p>17 Q. Okay. But other than your</p> <p>18 general knowledge and the manuals you</p> <p>19 reference, is there any other basis for your</p> <p>20 understanding?</p> <p>21 A. I didn't find anything when I</p> <p>22 was doing the research on oil cool and letting</p> <p>23 them sit at a standstill when I did the web</p> <p>24 research.</p>



<p style="text-align: right;">Page 101</p> <p>1 Q. Are those the web pages that  2 you're going to provide me with a copy with at  3 some point?  4 A. Well, no, I did a web  5 research. These are just some of the pages  6 that I came across that I printed out as some  7 examples of what I was finding on the web.  8 Q. Did you find -- did you search  9 for fires for other manufacturers?  10 A. I didn't do a specific search,  11 for example, Kawasaki XYZ bike. I just looked  12 at starting at a standstill, cold weather  13 winterization trends, tips, practices. I  14 looked at, like I said, the manuals for the  15 other bikes to see if they were warning  16 against the practice because of a potential  17 fire hazard and I didn't see any.  18 Q. You gave me three manuals,  19 three Yamaha and one Harley, were those the  20 manuals that you said you researched?  21 A. I do have a couple more Yamaha  22 manuals that I looked at, and Kawasaki, I  23 think. They're on the disk. So whatever  24 manuals I pulled out I put on the disk.</p>	<p style="text-align: right;">Page 103</p> <p>1 have asked Pat Hughes to ask me to provide my  2 references that were cited in my report.  3 So I put together the  4 references that were cited in my report. In  5 my report I cited specific pages to those  6 manuals. So instead of providing the entire  7 manual I provided those specific pages. On  8 the disk I provided the entire manual for the  9 Yamahas, not for the Harley-Davidson because I  10 didn't have the Harley-Davidson in PDF format,  11 I had hard copy. So I had to scan the pages  12 that I was interested in, if that makes sense.  13 Q. This flash drive, what's on it?  14 MR. LEVINE: I can tell you  15 because I have it open, or you can ask him.  16 MR. HEINOLD: Well, I'm going  17 to ask him.  18 MR. LEVINE: Okay.  19 THE WITNESS: It's all the  20 documents that I have that are related to --  21 specifically related to this case.  22 BY MR. HEINOLD:  23 Q. Anything that's not referenced  24 in your report on the flash drive?</p>
<p style="text-align: right;">Page 102</p> <p>1 There was a number -- I'm sorry  2 to interrupt, but there were a number of  3 years. Like I cited the 2002 models and the  4 XVS 1100 and the Road Star XV 16A. There were  5 multiple model years manuals that I had for  6 either one or both of the bikes. I don't  7 recall offhand.  8 Q. It was -- well, you provided  9 like a covering page for two different  10 manuals. Do you think there's something more  11 some?  12 A. I think I provided the entire  13 manuals for the Yamahas on the disk. The  14 Harley-Davidson Manual I only provided the  15 cover of the page because I would have had to  16 scan the entire thing.  17 Q. Well, what is on -- I got a  18 link from your attorney that had the  19 references which you cited. This flash drive  20 that you're providing that's different;  21 correct?  22 A. Yes, I'm sorry. The references  23 were to those specific pages. So I think  24 that's why when I -- I don't recall, you may</p>	<p style="text-align: right;">Page 104</p> <p>1 A. Yes.  2 Q. What?  3 A. Well, for example, the  4 motorcycle pictures that I mentioned earlier.  5 Q. Okay.  6 A. The websites that I printed  7 that I mentioned earlier. And then like I  8 said, the full manuals for several model year  9 Yamahas. There's a Road Star 2000 Manual,  10 E-Star 2010, E-Max 2011, E-Star 2001 and  11 E-Star 2002. I believe they're the complete  12 manuals, not just pages.  13 Q. Anything else on there that  14 wasn't part of your references that I would  15 have received?  16 A. I don't believe so. Other than  17 what we talked about, right, the pictures and  18 the --  19 Q. Yes, hence the word "else".  20 MR. HEINOLD: That's for me,  21 right?  22 MR. LEVINE: That is for you.  23 BY MR. HEINOLD:  24 Q. Let's talk about, you mentioned</p>

<p style="text-align: right;">Page 105</p> <p>1 the recall motorcycle and the warning on the  2 recall motorcycle.  3 A. Okay.  4 Q. Did you consider that warning,  5 the on-product portion adequate?  6 A. I don't know that I considered  7 that adequate. I don't recall offhand what  8 the warning looked like, number one. So I  9 don't recall if it had the appropriate signal  10 word panel. And two, the language is still a  11 bit -- what's the word I want to use? It's  12 not specific and explicit.  13 Q. What page in your report are  14 you referring to?  15 A. 11.  16 Q. Okay. What is -- I think you  17 said not specific and some other --  18 A. Explicit.  19 Q. What is not explicit and  20 specific in that language?  21 A. Well, my understanding is that  22 BMW intended -- well, you go down to the --  23 I'm sorry, you go down to the warning in the  24 manual, it says: Do not keep the engine</p>	<p style="text-align: right;">Page 107</p> <p>1 language from the on-product label that was  2 put on the 1997 motorcycle; correct?  3 A. I'm sorry, I was reading it and  4 I didn't follow your question.  5 Q. Okay. We're on Page 11 of your  6 report, and indented there you have three  7 lines that purport to repeat the language that  8 was on the on-product label as part of that  9 recall?  10 A. Yes.  11 Q. And just below that you have  12 the language that was part of the warning  13 insert to the Rider's Manual?  14 A. Yes.  15 Q. And you were comparing the  16 on-product to the Rider's Manual insert just a  17 moment ago?  18 A. I was -- yes.  19 Q. And you were saying that the  20 on-product label wasn't sufficient, wasn't  21 explicit or specific?  22 A. Yes.  23 Q. And in contrast you referred to  24 the insert?</p>
<p style="text-align: right;">Page 106</p> <p>1 running while the motorcycle is at a  2 standstill - Risk of overheating and fire.  3 Ride away immediately after starting the  4 engine.  5 When you look at the warning  6 that was on the -- they put on the motorcycle  7 itself it says: Avoid increased idle speed at  8 a standstill with choke in use - Risk of  9 overheating and fire.  10 They're two different  11 messages. So the one says -- the one that's  12 on bike says: Avoid increased idle speed at a  13 standstill with choke in use. The other one  14 says: Do not keep the engine running while  15 the motorcycle is at a standstill. Ride away  16 immediately after starting the engine.  17 So if you want them to ride  18 away immediately after starting the engine you  19 need to specifically and explicitly state that  20 in the warning on the product.  21 Q. Okay. Is the warning from the  22 insert -- let's do a little housekeeping.  23 We're looking at Page 11 of  24 your report, and in the middle you have the</p>	<p style="text-align: right;">Page 108</p> <p>1 A. Yes.  2 Q. Is that specific and explicit?  3 A. The information in the insert  4 warning provides more information to  5 understand the hazard and what the issue is  6 and what you need to do to avoid it.  7 Q. So is that sufficiently  8 explicit and specific?  9 A. I think that it's okay for an  10 on-product warning. My opinion would be that  11 if you're going to include that in your manual  12 that you provide additional information to let  13 the user know what the problem is and why it's  14 a problem. So part of the, you know, reason  15 that you provide information in manuals,  16 warnings in manuals is you have more space to  17 provide more information.  18 So as I note in my report on  19 Page 15 that the appropriate thing to do was  20 to repeat the on-product warning in the manual  21 with an explanation of how the fire occurs.  22 Q. So the insert in the manual is  23 okay, it's sufficient if you were going to put  24 that on the product?</p>



<p style="text-align: right;">Page 109</p> <p>1 A. I think it's better than what  2 they did provide on the product.  3 Q. Is it sufficient?  4 A. If I was designing it I would  5 say you put the one on Page 14 of my report.  6 I think that's specific and explicit and  7 succinct.  8 Q. Do you understand that --  9 strike that.  10 Do you have an understanding of  11 the issue that led to the recall?  12 A. Yes.  13 Q. What is it, your understanding?  14 A. It looks like there were  15 multiple fires reported to BMW with this  16 particular model motorcycle. They attributed  17 it to the fact that while it was idling at a  18 higher idle than no choke, for example, that  19 the engine was heating up, overheating and  20 igniting the fairing that was adjacent to  21 either the exhaust or the engine itself.  22 Q. Okay. So it was the fairing  23 which was igniting rather than the oil sight  24 glass which was deformed?</p>	<p style="text-align: right;">Page 111</p> <p>1 me ask you. Let me start that over.  2 Do you have an understanding  3 whether as a result of the fairing igniting,  4 whether the design of the BMW motorcycles at  5 issue is changed?  6 A. It's my understanding that the  7 incident bike in the recall was discontinued  8 at some point in time, and then the 1150,  9 R 1150 took its place and that the R 1150 had  10 three different packages, if you will. The  11 one involved in this incident was like a  12 strip-down version. And then the next two had  13 different levels of front bearings and so  14 forth.  15 I think Yeldham testified that  16 there was a potential for the oil sight glass  17 to fail in the 1150 due to the engine  18 overheating at a standstill or the potential  19 for the front fairing and/or wiring harness on  20 the bikes to ignite because of the heat of the  21 exhaust when at a standstill.  22 Q. On the subject motorcycle?  23 A. Not on the subject motorcycle  24 because it didn't have a -- the front fairing</p>
<p style="text-align: right;">Page 110</p> <p>1 A. I think -- my understanding is  2 that at least from the discussions with NHTSA  3 it was the fairing that was igniting due to  4 its proximity to either the exhaust or the  5 engine. They're pointing it to the exhaust  6 system temperature rising considerably  7 increasing the risk of fire.  8 Q. As a result of the fairing, the  9 ignition of the fairing?  10 A. The ignition of the fairing,  11 yes.  12 Q. This did not involve oil sight  13 glass failures?  14 A. That's not what's noted in the  15 NHTSA notification. I don't know if Mark  16 Yeldham testified that the oil sight glass was  17 involved or not. I don't recall offhand.  18 Q. Okay. Do you have any  19 information if the oil sight glass was  20 involved in the recall issue?  21 A. Not based upon the NHTSA  22 document that I have.  23 Q. What is your understanding of  24 what the change in the design would be -- let</p>	<p style="text-align: right;">Page 112</p> <p>1 wasn't near the exhaust, but on the -- there's  2 two other versions of that same bike. I don't  3 remember the names offhand, but they had  4 different levels of the amount of fairing on  5 the front of it.  6 Q. When you say the names, what do  7 you mean?  8 A. Well, the incident bike was the  9 R 1150 R. My understanding is that there were  10 two versions of that bike. There was the  11 R 1150 R, and I don't know what the letter  12 designations were for those other two models.  13 Q. Were you aware of any fires  14 regarding the fairings?  15 A. Apparently one of the other  16 models is the R 1150 GS, and I'm aware of a  17 fire as a result of the oil sight glass  18 failing on that bike. There's an R 1150 80V  19 that also was involved in an oil sight glass  20 fire, oil sight glass failure fire.  21 And it looks like there's a  22 fire involving an R 11 RT that involved an oil  23 leak. It doesn't say whether the oil sight  24 glass failed or not.</p>

<p style="text-align: right;">Page 113</p> <p>1 Q. These are allegations; correct?</p> <p>2 A. These are a list of claims.</p> <p>3 Q. Right. A claim is an</p> <p>4 allegation?</p> <p>5 A. I don't know if I can agree or</p> <p>6 not agree with that statement.</p> <p>7 Q. Okay. What is that document</p> <p>8 you're looking at?</p> <p>9 A. It's a BMW production document</p> <p>10 summary.</p> <p>11 Q. Prepared by?</p> <p>12 A. Mr. Hughes' office.</p> <p>13 Q. Is that part of what you</p> <p>14 provided me on this flash drive?</p> <p>15 A. It has to be.</p> <p>16 Q. Okay. You hadn't mentioned it</p> <p>17 as one of the -- when I said anything else,</p> <p>18 but it's your book and your --</p> <p>19 A. I think that was part of the</p> <p>20 material reviewed. I'm sorry, I was including</p> <p>21 that under the material available for review.</p> <p>22 Q. Perhaps I didn't notice it. I</p> <p>23 didn't notice it in your materials available</p> <p>24 for review.</p>	<p style="text-align: right;">Page 115</p> <p>1 purposes of your opinions about whether he</p> <p>2 read those or didn't read those?</p> <p>3 A. To me it doesn't matter if he</p> <p>4 read them or didn't read them several years</p> <p>5 before the fire.</p> <p>6 That's one of the limitations</p> <p>7 of providing information and important</p> <p>8 warnings in the manual is that people are</p> <p>9 likely to overlook it, they're likely to</p> <p>10 forget it, and they're likely not to be</p> <p>11 recalling or thinking about it at the time the</p> <p>12 information is needed. Hence the need for an</p> <p>13 on-product warning.</p> <p>14 Q. Is it important to read the</p> <p>15 Manual?</p> <p>16 A. It depends.</p> <p>17 Q. It depends on what?</p> <p>18 A. It depends on whether it's</p> <p>19 required or not to use and operate the piece</p> <p>20 of equipment or machinery.</p> <p>21 Q. How does someone know whether</p> <p>22 it's required until they read?</p> <p>23 A. Well, two things. One is that</p> <p>24 the product may be like other products that</p>
<p style="text-align: right;">Page 114</p> <p>1 A. Yeah, I don't -- I didn't</p> <p>2 reference the summary. I just referenced the</p> <p>3 document. Now I forget the question there.</p> <p>4 Q. There wasn't. You finished.</p> <p>5 A. Okay.</p> <p>6 Q. What assumption, if any, did</p> <p>7 you make about whether Mr. Yazdani read this</p> <p>8 manual?</p> <p>9 A. It's my understanding that he</p> <p>10 was provided with the manual for the</p> <p>11 motorcycle when he purchased it used and that</p> <p>12 after getting home -- driving the motorcycle</p> <p>13 home, at some point in time he read it when he</p> <p>14 first got the bike.</p> <p>15 Q. What's your assumption about</p> <p>16 whether he read the pertinent sections of this</p> <p>17 manual that dealt with the warning not to</p> <p>18 leave it at a standstill because it might</p> <p>19 overheat and cause a fire?</p> <p>20 A. Mr. Yazdani testified that he's</p> <p>21 not sure if he read them, and if he read them,</p> <p>22 that it sunk in, if you will. And if he had</p> <p>23 read them, he didn't remember them,</p> <p>24 Q. What are your assumptions for</p>	<p style="text-align: right;">Page 116</p> <p>1 they've used in the past, and therefore they</p> <p>2 possess the knowledge necessary to use it. Or</p> <p>3 two, the manufacturer has a requirement to</p> <p>4 read it. And then if they have a requirement</p> <p>5 to read it, it may not be all that important</p> <p>6 to read it.</p> <p>7 Q. Is it important to your opinion</p> <p>8 whether Mr. Yazdani read it and understood it</p> <p>9 prior to the accident?</p> <p>10 A. No, it doesn't matter to me.</p> <p>11 My assumption is that either he read it, read</p> <p>12 it and didn't understand it, or read it,</p> <p>13 understood it and forgot it. Either way he</p> <p>14 wasn't thinking about it at the time.</p> <p>15 He had read the manual several,</p> <p>16 I don't know if it's two years or</p> <p>17 year-and-a-half before the fire, but it's very</p> <p>18 common for people to read information in</p> <p>19 manuals and then not have a recollection of it</p> <p>20 or not be thinking about it at the time the</p> <p>21 information is needed.</p> <p>22 Again, this gets back to the</p> <p>23 necessity of on-product warning for a unique</p> <p>24 and atypical hazard.</p>

<p style="text-align: right;">Page 117</p> <p>1 Q. If he did not read, but would  2 have understood it if he had read it, is that  3 important for your opinion?  4 A. I think he testified that had  5 he read it he would have understood it. I  6 think he read it and in his deposition said he  7 understood it.  8 Q. Okay. Is that important to  9 your opinion?  10 A. To me it's irrelevant because  11 he wasn't thinking about it at the time. So  12 that's part of the problem with the warning in  13 the manual, is that people, A, don't read it,  14 B, read it and don't remember it at the time  15 or the location where the information is  16 necessary.  17 Q. If he read it and understood  18 it, forgetting about whether he forgot it or  19 whether he should have been reminded of it,  20 the message in the manual was sufficient at  21 least to be understood as to the activity and  22 the consequences; correct?  23 A. That's what Mr. Yazdani  24 testified, that he understood what the warning</p>	<p style="text-align: right;">Page 119</p> <p>1 incident. He's not sure if he ever read it.  2 Q. Do you think he would have  3 recalled if the warning had been different?  4 A. I think that had the warning  5 been different it would have been more  6 appropriate, but I don't know that he would  7 have recalled it at the time.  8 Q. So this case boils down to an  9 on-product warning?  10 A. The case boils down to the fact  11 that there was a design defect in the  12 motorcycle, and that instead of fixing it  13 through a design or providing an adequate  14 safeguard they provided an inadequate warning  15 in the manual.  16 Q. And the design defect was what?  17 A. The fact that the oil sight  18 glass can fail when the bike is left at a  19 standstill, which is a customary, foreseeable  20 use of the motorcycle.  21 Q. But you're relying on others to  22 determine that design defect?  23 A. Sure. I'm relying upon Mark  24 Yeldham and his testimony as to what the</p>
<p style="text-align: right;">Page 118</p> <p>1 meant in the manual.  2 Q. So in this case your criticism  3 is not of the information imparted in the  4 manual because it was adequate, was it not?  5 A. Well, I have opinions with  6 regard to whether or not the information that  7 was provided in the manual is adequate or not,  8 but to this case they're irrelevant.  9 The point is that we don't know  10 if Mr. Yazdani read it or not, but he wasn't  11 thinking about it at the time. It was a  12 unique or atypical hazard associated with this  13 motorcycle, and had the proper warning been on  14 the product it would have insured that Mr.  15 Yazdani saw it, read it, understood it both  16 when he got the bike and then when he was  17 started it or planning on starting it a year  18 and a half, two years later.  19 Q. Is it also irrelevant because  20 he said I read it and understood it?  21 A. That's what he testified to.  22 Q. Does that make it irrelevant?  23 A. It doesn't make it irrelevant  24 because he didn't recall it at the time of the</p>	<p style="text-align: right;">Page 120</p> <p>1 problem was.  2 Q. So in terms of the warning in  3 the manual, let me --  4 A. I have it here if you would  5 like it.  6 Q. Yes, let's do a little  7 housekeeping. We've been referring to some  8 things.  9 MR. HEINOLD: Let's mark his  10 report as Vigilante-1.  11 ---  12 (Whereupon, Exhibit Vigilante-1 was  13 marked for identification.)  14 ---  15 MR. HEINOLD: And we'll mark  16 his Testimony List as Exhibit 2 and his  17 Curriculum Vitae as 3.  18 ---  19 (Whereupon, Exhibits Vigilante-2, 3 and  20 4 were marked for identification.)  21 ---  22 BY MR. HEINOLD:  23 Q. I'm going to show you what's  24 been previously marked as Yazdani-1 and now</p>

<p style="text-align: right;">Page 121</p> <p>1 marked as Vigilante-4, which is the cover  2 sheet and two pages of the Rider's Manual that  3 you have the original of and I have the  4 original of. Do we have the same one?  5 A. Wait, you have a publication  6 date on that?  7 MR. LEVINE: The last page.  8 THE WITNESS: 10/2002?  9 MR. HEINOLD: Yes.  10 THE WITNESS: All right.  11 BY MR. HEINOLD:  12 Q. I didn't mark down the Bates  13 number.  14 A. It's BMW North America 1  15 through BMW North America 2, BMWNA55 and  16 BMWNA64.  17 Q. One is 55, I believe that is  18 Page 351, Section 3, Page 351?  19 A. That is -- I'm going to say  20 it's 51.  21 Q. Okay. Down in the lower  22 right-hand corner of that page, all right,  23 would you read that into the record?  24 A. Sure. You want me start from</p>	<p style="text-align: right;">Page 123</p> <p>1 and in a box?  2 A. It's not the traditional way to  3 do signal work, but I'm not going to argue  4 about it because it looks like the entire  5 manual is black and white, except for the  6 front page. So they apparently chose to do  7 everything in black and white.  8 MR. LEVINE: He does not opine,  9 I don't believe, or criticize the form and  10 substance of the in manual warning; am I  11 correct?  12 THE WITNESS: That's correct.  13 It wasn't relevant to my opinions.  14 MR. LEVINE: He will not be  15 testifying as such at trial. You can do what  16 you want. I just thought that I would clarify  17 that.  18 BY MR. HEINOLD:  19 Q. But is it -- you say it's  20 irrelevant. My only question is, is it  21 inadequate?  22 A. It is inadequate.  23 Q. Is adequate or inadequate?  24 A. It is inadequate the way it's</p>
<p style="text-align: right;">Page 122</p> <p>1 Risk of fire or the Warning?  2 Q. You can start with the  3 Warning.  4 A. Warning: Make sure --  5 Q. There's a Warning in large  6 letters, all bold, all caps, right, with a  7 Warning placard?  8 A. Oh, Warning: Make sure that  9 whether riding or standing still or when the  10 motorcycle is parked no easily flammable  11 material (for example, hay, grass, leaves,  12 clothing or luggage, etc.) can come into  13 contact with the hot exhaust system. Do not  14 allow the engine to idle unnecessarily or for  15 prolonged periods - Risk of overheating or  16 fire. Ride away immediately after starting  17 the engine.  18 Q. Okay. Now, the word Warning is  19 large; correct?  20 A. It's larger than the print on  21 the page.  22 Q. Do you have a criticism with  23 the use of the Warning placard, the use of the  24 word Warning with all capitals and all bold</p>	<p style="text-align: right;">Page 124</p> <p>1 presented on that page.  2 Q. Why?  3 A. Well, first of all, the section  4 above it starts: Risk of fire, high  5 temperatures at the exhaust system,  6 particularly if the catalytic converter is  7 installed.  8 So obviously that's dealing  9 with a different fire cause scenario than the  10 oil sight glass failing. So I would think  11 that it's fairly self evident that the exhaust  12 gets hot and there's a potential for fire.  13 So now we have a warning  14 directly underneath that information that  15 deals with, again, stuff, combustibles coming  16 in contact with the hot exhaust system. A  17 person reading it would be expected to read  18 the Risk of fire section above it, get to the  19 warning and think that the whole thing, the  20 whole section was related the exhaust system  21 and the exhaust system being hot.  22 So they bury the information  23 related to not allowing it to idle  24 unnecessarily or for long periods within the</p>

<p style="text-align: right;">Page 125</p> <p>1 section dealing with don't let hot stuff  2 contact hot exhaust. So that warning should  3 have been related to don't let it idle  4 unnecessarily for long periods, should have  5 been separated from the other information to  6 make it distinct and to let readers know that  7 it's a different topic, a different specific  8 topic.  9 Second, Do not allow the engine  10 to idle unnecessarily or prolonged periods.  11 Neither of those terms, unnecessarily or  12 prolonged, are defined. I think Mark Yeldham  13 testified to that as well. We don't know what  14 unnecessarily or prolonged means and neither  15 does the reader.  16 So, for example, Mr. Yazdani  17 testified that he was starting the bike  18 because he didn't winterize it. So obviously  19 it was necessary to him to start the bike  20 because he wasn't winterizing it. A prolonged  21 period is, again, open to interpretation.  22 Some people's fires apparently  23 claim they're happening in 10 to 15 minutes.  24 Mr. Yazdani is not sure how long exactly he</p>	<p style="text-align: right;">Page 127</p> <p>1 reasons why this information on Page 51 of the  2 manual is inadequate.  3 Kind of a higher level issue is  4 that this atypical hazard associated with the  5 failure of the sight glass isn't communicated  6 to the rider or the reader until Page 51.  7 That means they've had 50 pages of other  8 information about the bike that doesn't  9 reference the fact that the oil sight glass  10 can fail and cause a fire if you let it idle  11 for periods of 10 to 15 minutes or longer.  12 And then I did forget to  13 mention too that it doesn't tell you why  14 there's a risk of fire for letting it idle,  15 that being the oil sight glass can fail or the  16 wire harness can ignite. So it would be nice  17 to know, typically in the manual, why they're  18 telling me why not to idle unnecessarily or  19 for a prolonged period of time.  20 Q. Are you finished?  21 A. Yes.  22 Q. Okay. Doesn't the phrase "ride  23 away immediately" help define not allowing the  24 engine to idle unnecessarily or prolonged</p>
<p style="text-align: right;">Page 126</p> <p>1 let the bike run, up to a half hour, maybe a  2 little bit longer. It could have been a  3 little bit less. So we don't know if he had  4 planned on leaving it run for 30 minutes  5 whether the fire would have started within  6 that period of time. If he planned on letting  7 it run for 15 minutes you don't know whether  8 the fire would have started in that time or  9 not. So, it's not specific, it's not explicit  10 and leaves open to interpretation as to what  11 is necessary, what is prolonged.  12 And then we have: Ride away  13 immediately after starting engine. That's in  14 direct conflict with other instructions in the  15 manual that tell you have to put it in high  16 choke, hold the button in for some period of  17 time on a cold engine until the engine warms  18 up enough that you can release it so that the  19 bike doesn't stall.  20 So that's apparently in direct  21 conflict, unless you expect the rider to be  22 holding the choke start or the choke button in  23 while riding down the street, which I don't  24 think BMW intended. So they're some of the</p>	<p style="text-align: right;">Page 128</p> <p>1 periods?  2 Is it your testimony that  3 there's no correlation there, there's no  4 assistance in helping the reader understand  5 what unnecessarily or for prolonged periods  6 mean?  7 A. Well, two things. The question  8 is whether or not it's related to Do not allow  9 the engine to idle unnecessarily or for  10 prolonged periods, or is related to the  11 potential for combustible to contact the  12 exhaust. So we don't know based upon the way  13 it's formatted and presented.  14 Second, the ride away  15 immediately after starting the engine is  16 contrary and conflicting with other  17 instructions, and the reality of starting this  18 bike on a cold day. That you can't ride away  19 immediately after starting the engine. You  20 have to go through a warm-up period. So  21 obviously it's in direct conflict with other  22 instructions in the book.  23 Q. Where is the conflict for the  24 other instructions?</p>



<p style="text-align: right;">Page 129</p> <p>1 A. Well, Mark Yeldham testified  2 that on cold days you have to hold the choke  3 in all the way for it to heat up. Otherwise,  4 the engine will stall if you release it.  5 So, again, if you have to hold  6 the choke in for a period of time on cold  7 engines to get it not to stall, you can't ride  8 away immediately. It means that you have to  9 let that bike warm up for some period of time.  10 Now, Mr. Yeldham also testified  11 that what that period of time is subjective to  12 the user. So if it's subjective to the user,  13 one rider may think that five seconds is okay,  14 another rider may think 10 minutes is  15 necessary. Again, that's the problem with not  16 being specific and explicit, you're allowing  17 the user to interpret subjective terms.  18 Q. You agree that -- what are you  19 looking at there?  20 A. Oh, this is my summary of Mark  21 Yeldham's testimony.  22 Q. That's also on your flash  23 drive?  24 A. Yes.</p>	<p style="text-align: right;">Page 131</p> <p>1 and how to avoid it and what can happen if  2 it's not avoided and why it occurs.  3 Q. For the reasons you stated?  4 A. Yes.  5 Q. How about on Page 60 of the  6 manual. I think it's Bates number 64 on  7 Yazdani Exhibit 1.  8 A. Page 60, right?  9 Q. Yes. Do you consider that  10 inadequate?  11 A. Yes.  12 Q. Why?  13 A. Again, first of all, it's on  14 Page 60 of the manual as opposed to being at  15 the start of the manual to alert and inform  16 someone before they read 59 pages of things  17 that are not related to this hazard.  18 Second, the risk of overheating  19 or fire is provided after telling them do not  20 warm up the engine with the motorcycle at a  21 standstill. It would have been more  22 appropriate to say, warning, fire hazard, and  23 then you can explain it, as opposed to giving  24 the consequence of fire as the very last part</p>
<p style="text-align: right;">Page 130</p> <p>1 Q. Would you agree that Mr.  2 Yazdani said when he read it that he  3 understood it?  4 A. In his deposition that's what  5 he testified to.  6 Q. Yes. And that he understood  7 that he should not leave it at idle at a  8 standstill?  9 A. After the fact he certainly did  10 read it and understand it, but he also  11 testified that until the deposition he wasn't  12 aware of why this thing caught fire, which  13 means he didn't understand what he did and how  14 it correlated with the fire. So after the  15 fact in his deposition reading the manual he's  16 testified that he understood it.  17 Q. So it's your testimony that  18 this manual is not clear about one, don't  19 leave it at idle at a standstill because it  20 may catch on fire, is that your testimony?  21 A. My testimony is it's an  22 inadequate warning. The information provided  23 on Page 51 of the Manual is inadequate to  24 alert and inform a rider as to the fire risk</p>	<p style="text-align: right;">Page 132</p> <p>1 of that sentence.  2 The next sentence says: Ride  3 away immediately after starting the engine,  4 which is consistent with the other page.  5 However, directly under that it says: To  6 avoid overheating the air-cooled engine and  7 possible damage as a result, avoid even short  8 warm-up periods at a standstill. However, it  9 says, period, avoid high engine speeds after a  10 cold start.  11 So, again, it's inconsistent.  12 You have to have high-engine speeds after a  13 cold start because you're supposed to hold the  14 choke in. The choke in is associated with  15 high-engine speeds. Again, if you have to  16 hold the choke in until the engine warms up so  17 it doesn't stall out you can't ride away  18 immediately. So there's a conflict.  19 Also, it doesn't tell you that  20 the oil sight glass can fail and spread or  21 allow hot oil to escape and create a fire. So  22 someone may read that and think that if it's a  23 fire it's because combustible materials are  24 near the exhaust. That's probably why they</p>

<p style="text-align: right;">Page 133</p> <p>1 want me setting this bike -- letting it stand  2 still for a while. If I don't have any  3 combustibles it's not really an issue.  4 Q. Are you finished?  5 A. I think so.  6 Q. So is it your testimony that if  7 someone reads this sentence: Do not warm up  8 the engine with the motorcycle at a  9 standstill, the risk of overheating or fire,  10 with an exclamation point, that they are not  11 going to understand that they should not warm  12 up the motorcycle and engine at a standstill,  13 is that your testimony?  14 A. I think that if they read the  15 entire sentence they would understand that's  16 what the sentence had told them. But  17 again --  18 Q. They would understand what not  19 to do; correct?  20 A. But they would understand --  21 Q. Correct?  22 A. It's in conflict with other  23 parts of the manual and the testimony of Mark  24 Yeldham, that they can't follow it.</p>	<p style="text-align: right;">Page 135</p> <p>1 Q. So someone who is going to own  2 and operate a motorcycle they read the  3 statement: Do not warm up the engine with  4 motorcycle at a standstill, risk of  5 overheating or fire, exclamation point, is not  6 going to understand don't leave this idling at  7 a standstill or it might catch on fire, is  8 that your testimony?  9 A. No. My testimony is that it's  10 in conflict with other information in the  11 manual, but it's also, this is important too,  12 for the purchaser of a new bike, it's  13 inconsistent and in conflict with the training  14 that the BMW North America dealership is  15 providing him on how to operate the bike.  16 So you've got a statement in  17 the manual that's in direct contrast, conflict  18 with other parts in the manual, their own  19 prior experiences if they've ridden and used  20 motorcycles before, and the training that BMW  21 provided them if they purchased it new from  22 the dealership.  23 Q. What is that training?  24 A. According to Mark Yeldham</p>
<p style="text-align: right;">Page 134</p> <p>1 Q. The conflict with other parts  2 of the manual meaning the use of the choke?  3 A. It tells you start the engine,  4 but hold the choke in until the engine smooths  5 out, go to low choke, and then you can go.  6 Mark Yeldham testified that if  7 you come up high choke too soon the engine  8 will stall. He testified that you have to  9 hold the choke in its high position until the  10 engine smooths out, and that smooth-out  11 process is subjective or the smooth-out point  12 is subjective.  13 Q. Okay. So that someone who is  14 operating a motorcycle, can we -- let me step  15 back.  16 Can we assume that someone who  17 is going to operate a motorcycle has a basic  18 understanding of how to operate it?  19 A. As you mean -- excuse me, do  20 you mean how to start it and ride it, I'm sure  21 they do, unless it's an unfamiliar bike that  22 maybe they're borrowing a friend's or what  23 have you, then may need someone to show them  24 how to start it.</p>	<p style="text-align: right;">Page 136</p> <p>1 they're trained to show them how to start the  2 bike by holding in the choke until the engine  3 smooths out and then dropping it down to the  4 detent position of the choke switch.  5 Q. Are there any parameters on how  6 long that takes in a motorcycle like this?  7 A. Well, that's part of what Mr.  8 Yeldham testified to. It's subjective and  9 it's depended upon the ambient temperature and  10 the temperature of the engine. So it may take  11 a shorter amount of time if the machine is  12 warm or if the temperature is warmer. It may  13 take a longer time. It's also subjective to  14 the user. And either you let it go long  15 enough, whatever that time may be because it  16 is very variable, or you come off too soon,  17 and if you come off too soon the engine can  18 stall.  19 Q. Are there any parameters on  20 that time?  21 A. Mark Yeldham testified it was  22 subjective.  23 Q. Subjective. Are there any  24 parameters in your mind?</p>



<p style="text-align: right;">Page 137</p> <p>1 A. I'm relying upon Mark Yeldham.  2 He should know the bike better than me.  3 Q. So could someone have to hold  4 the choke in for two hours?  5 A. I doubt it.  6 Q. Okay. So there has to be some  7 parameter?  8 A. But it could be in warm  9 weather. It could be a warm engine. It might  10 be 10 seconds. It could be a couple minutes.  11 If it's cold weather, cold engine.  12 Now, my Harley-Davidson  13 Sportster had a manual choke. It wasn't on  14 the handlebar. It was a switch underneath  15 the -- or on the side of the engine, I  16 believe, and it would have to stay warmed up  17 for several minutes. In five or 10 minutes if  18 I was taking that bike out in January, which I  19 did often, even when I was a younger rider, to  20 get it to get into the mid point of the choke  21 before I could ride off, otherwise it would  22 stall. It took minutes, 10 minutes, 15  23 minutes to warm up at high choke.  24 It wasn't -- I don't know what</p>	<p style="text-align: right;">Page 139</p> <p>1 and it leaves room for interpretation, which  2 is subjective, which leads to all different  3 kinds of conclusions. Some of them may be  4 right, but some of them are going to be  5 wrong.  6 And that's the problem,  7 warnings aren't supposed to be subjective.  8 They're not supposed to leave open for  9 interpretation. They're supposed to be  10 specific, explicit and they're supposed to be  11 consistent with other information and  12 experiences. If they're not, it leaves people  13 to question the warning and then come up with  14 their own subjective idea of what the warning  15 is supposed to me and what they're supposed to  16 do. And some people will get it right and  17 some people will get it wrong. And that's not  18 the definition of an adequate warning.  19 Q. Okay. So it's your opinion if  20 someone reads, Do not warm up the engine with  21 the motorcycle at a standstill - Risk of  22 overheating or fire, is going to say it's okay  23 for me to leave this warming up at a  24 standstill for 30 minutes or more? Is that</p>
<p style="text-align: right;">Page 138</p> <p>1 the BMW is. According to Mr. Yeldham it's  2 subjective. But I do know with other bikes  3 that it could take a number of minutes, a  4 period of time for it to warm up.  5 Q. So the basis of your opinion is  6 that the operator of an motorcycle would not  7 be able to tell the difference between the  8 time you have to leave the choke on until it  9 smoothed out and not leaving the motorcycle  10 engine running at a standstill because it  11 might catch on fire?  12 A. Exactly. You're telling him  13 two different things.  14 Q. And the motorcycle rider can't  15 tell the difference between those two things?  16 A. I think he would look at it and  17 say what the heck is this trying to say,  18 because it's inconsistent with my experience,  19 my past experience, and it's inconsistent with  20 the training BMW gave me, and it's  21 inconsistent with other parts of the manual.  22 So is this some type maybe translation error  23 from German. I don't know what the rider is  24 going to think, but it's certainly not clear</p>	<p style="text-align: right;">Page 140</p> <p>1 your opinion?  2 A. I doubt that they will read  3 that and say that allowing it to warm up for  4 30 minutes or more is appropriate.  5 Q. Okay. How about 20 minutes or  6 more, would they say that?  7 A. Probably not 20 minutes.  8 Q. How about five minutes?  9 A. That's where it get  10 questionable because then some bikes -- some  11 temperatures it's going to take five minutes  12 of warming up on high choke for that engine to  13 smooth out.  14 Q. So do you disregard for your  15 opinions in this case the fact that Mr.  16 Yazdani read the warning and said I understood  17 it, I understood the communication to me what  18 not to do and the consequence of it and I just  19 don't remember reading it?  20 A. Well, I think he testified that  21 reading it in the deposition he understands.  22 That's reading it in the deposition after a  23 fire occurred, after being told what happened  24 he understands what the manual means.</p>

<p style="text-align: right;">Page 141</p> <p>1 He testified that he's not sure  2 if he read that part of the manual or if he  3 read it, if he understood it at the time he  4 read it, or if he read it and either  5 understood it or didn't understand it, but he  6 didn't remember it.  7 So asking him after the fact,  8 the Monday morning quarterback, what that  9 statement means is not fair and is not the  10 right way or a valid way to assess the  11 adequacy of that warning.  12 Q. Do you believe -- you said that  13 he didn't know whether he would have  14 understood it if he read it back before the  15 fire?  16 A. That's what he testified to.  17 Q. And that's important to your  18 opinion?  19 A. What's important to my opinion  20 is that the warning wasn't on the bike to  21 alert and inform the rider of the unique fire  22 hazard associated with the design of this  23 bike.  24 Q. Is it important to your opinion</p>	<p style="text-align: right;">Page 143</p> <p>1 It's my opinion had he read the  2 manual that it wouldn't have been adequate to  3 inform him of the fire hazard at the time he  4 first owned the bike. Therefore, even if he  5 had read it and understood -- if he had read  6 it he wouldn't have understood what BMW was  7 trying or claiming that the warning is  8 intended to address and intended to say. It  9 would be my opinion that he wouldn't have  10 understood it at that time.  11 MR. HEINOLD: Can you read the  12 question back and can you answer it this time.  13 - - -  14 (Whereupon, the court reporter read  15 back the pertinent information.)  16 - - -  17 THE WITNESS: It's the same  18 answer.  19 MR. LEVINE: Do you feel he's  20 not answering your question?  21 MR. HEINOLD: Yes.  22 MR. LEVINE: I heard the  23 question, I heard the answer. Let me break it  24 down and see if I understand. You've asked</p>
<p style="text-align: right;">Page 142</p> <p>1 that you believe Mr. Yazdani would not --  2 might not have understood the warning if he  3 read it back before the fire?  4 A. It would be important to my  5 opinion if Mr. Yazdani testified that he read  6 it in the Manual, he fully understood it,  7 could explain it and was thinking about it at  8 the time of the fire and did it anyway. That  9 would certainly be important to my opinion.  10 MR. HEINOLD: Can your read  11 back my question and please answer my  12 question.  13 - - -  14 (Whereupon, the court reporter read  15 back the pertinent information.)  16 - - -  17 THE WITNESS: It's my opinion  18 that Mr. Yazdani did not appreciate the fire  19 hazard associated with his actions, whether  20 it's because he didn't read the manual or read  21 it and didn't understand it, or read it,  22 didn't understand it or understood it and  23 forgot it. He wasn't aware of it at the time  24 of the fire.</p>	<p style="text-align: right;">Page 144</p> <p>1 him, is it your opinion that it would not have  2 mattered?  3 MR. HEINOLD: No. I asked  4 him -- he said he wouldn't have understood it  5 and that he testified -- strike that. I'll  6 start over.  7 He said that Mr. Yazdani  8 testified that he wouldn't have understood it  9 back then or might not have understood it back  10 then. And I said: Is it important to your  11 opinion that he wouldn't have understood it?  12 That's a simple question.  13 MR. LEVINE: First off, is it  14 accurate that the witness here, Dr. Vigilante,  15 stated that he did not understand it, would  16 not have understood it, might have not  17 understood it, because you threw those in a  18 little bit softly there?  19 In other words --  20 MR. HEINOLD: I didn't throw  21 them in.  22 MR. LEVINE: Bear with me, I'm  23 going to get you your answer that you're  24 looking for, I promise you. You put that</p>

Page 145

1 supposition in in the beginning of your  
2 question: Based upon the fact that you have  
3 testified Mr. Yazdani might have not have  
4 understood, did not understood it or would not  
5 have understood it.  
6 MR. HEINOLD: I didn't ask the  
7 question that way, Ken.  
8 MR. LEVINE: I'm going to help  
9 you here. I'm promising you. Maybe I need to  
10 hear it again. I apologize.  
11 MR. HEINOLD: Go ahead, ask  
12 whatever you want to do.  
13 MR. LEVINE: No. I was asking  
14 her what your question was because I don't  
15 want to change your question.  
16 MR. HEINOLD: I'll start over.  
17 MR. LEVINE: I promise you I'm  
18 not going to let him avoid you.  
19 BY MR. HEINOLD:  
20 Q. Do you believe Mr. Yazdani said  
21 that he would not have understood that warning  
22 if he had read it back before the fire?  
23 A. What I testified to, and I'll  
24 read my summary of his testimony, he read the

Page 146

1 manual, but he does not recall if he read the  
2 manual, if he -- excuse me, I'll start over.  
3 He read the manual, but he does  
4 not recall if he read the warning and didn't  
5 register it or if he did not read the  
6 warning. So his testimony is he doesn't know  
7 if he read it, and if he read it, it didn't  
8 register to him. So that's my understanding.  
9 So there's no testimony,  
10 there's no evidence to state that he either  
11 read it and that if he read it, he understood  
12 it in the manner in which BMW North America is  
13 claiming they intended it to mean.  
14 So it's possible, it certainly  
15 is possible that Mr. Yazdani read that  
16 language or part of that language and took it  
17 to understand the same thing that other people  
18 would understand by reading the entire  
19 manual. And based upon prior experiences,  
20 that it's not consistent with the way you're  
21 supposed to use the bike, and that it's in  
22 conflict with the way you're supposed to use  
23 the bike. And if it's in conflict, how valid  
24 is the statement. And if it's not valid, why

Page 147

1 should I abide by it or comply with it.  
2 Q. Okay. When you testified  
3 earlier you said he testified he didn't  
4 understand it, he didn't know if he understood  
5 it. You just read that and you used the word  
6 registered and transformed registered into  
7 lack of understanding rather than perhaps it  
8 didn't sink in, perhaps he forgot rather than  
9 understand. We've been sitting here talking  
10 about whether this is understandable or not.  
11 I want to know -- after that  
12 description of why I'm asking you this  
13 question, I want to know this: Is it  
14 important to your opinion that he did not  
15 understand it prior to the accident if he read  
16 it?  
17 A. Again, my understanding is he  
18 testified he was not aware of the fire hazard  
19 prior to the incident. He testified he  
20 doesn't recall whether he read the manual --  
21 excuse me, that part of the manual, if he read  
22 it, if it didn't register --  
23 MR. LEVINE: I'm going to  
24 interrupt. You don't need to keep repeating

Page 148

1 what Mr. Yazdani did or didn't testify to. I  
2 appreciate that's part of your answer, but I  
3 sit here and listen to you repeating  
4 exactly -- we have read it. We've seen it,  
5 Bill. The question was entirely different.  
6 So he's asking you whether or  
7 not his opinion as expressed there, and  
8 correct me if I'm wrong, are important or  
9 unimportant to your opinions here? But if you  
10 want to correct me, go ahead.  
11 THE WITNESS: Yeah, it's not  
12 important to my opinion if -- I don't want  
13 to -- I'm not going to sit here and say that  
14 Mr. Yazdani read that manual and understood it  
15 the way BMW is intending it to mean at this  
16 point in time. So, that's number one, I'm not  
17 going to say that I agree with that.  
18 So based upon -- what I read  
19 through his deposition, I don't think that's  
20 correct that he understood the message that  
21 BMW was intending to convey. But if he did,  
22 understood that line when he read that manual  
23 when he first got the bike, it didn't sink in,  
24 it didn't register, he wasn't aware of it and

<p style="text-align: right;">Page 149</p> <p>1 he sure wasn't thinking about it or aware of  2 it at the time of the incident.  3 And that's because A, the  4 manual is inadequate and the information in  5 the manual is inadequate. And B, providing  6 the information only in the manual is  7 inadequate and inappropriate.  8 I'm starting to get a little  9 big tongue-tied because I'm starving. So it  10 might help if I eat, take a break.  11 MR. HEINOLD: Let's take a  12 break.  13 - - -  14 (Whereupon, a short break was taken at  15 this time.)  16 - - -  17 BY MR. HEINOLD:  18 Q. Do you believe the owner of a  19 motorcycle has the responsibility to  20 understand the motorcycle and its features in  21 order to own and operate it safely?  22 A. To a reasonable degree, sure.  23 Q. Okay. How to operate it?  24 A. Sure.</p>	<p style="text-align: right;">Page 151</p> <p>1 for the vehicle as opposed to understanding  2 all of its nooks and crannies.  3 Q. Are there parts that it's okay  4 to skip?  5 A. Sure.  6 Q. What parts are those?  7 A. Things that you're not  8 interested in or that you think you may have  9 already known. I think these are reasonable  10 things that people do quite often.  11 Q. When it says "Warning, Risk of  12 fire", is that okay to skip?  13 A. It depends on where it's  14 presented, how it's presented.  15 Q. Well, I mean, let me be clear.  16 Is it okay not to read it? Do you justify the  17 decision that an owner -- that a manual --  18 that an owner would look at the Rider's Manual  19 and see it said Warning, and then doesn't read  20 what the warning is? Do you justify that?  21 A. Again, it depends upon how it's  22 presented, where it's presented, why it's  23 presented and what other information it's  24 presented with.</p>
<p style="text-align: right;">Page 150</p> <p>1 Q. Its features and  2 characteristics?  3 A. To a reasonable degree.  4 Q. How to maintain it, service it?  5 A. To a reasonable degree.  6 Q. What the safety features are?  7 A. To a reasonable degree.  8 Q. Do you believe the owner of a  9 motorcycle has the responsibility to read the  10 Owner's Manual?  11 A. I don't believe they have the  12 responsibility to study an Owner's Manual.  13 They should read the manual, but I don't think  14 they have the responsibility to study it.  15 Q. What's the difference between  16 reading and studying in your mind?  17 A. The ability to extract every  18 piece of information the manufacturer provides  19 in the manual would be under the definition of  20 studying as opposed to reading it in a  21 leisurely fashion where you are collecting the  22 information that you're interested in and  23 perhaps skipping parts that you're not  24 interested in, and generally getting a feel</p>	<p style="text-align: right;">Page 152</p> <p>1 Q. I'm not talking about not  2 noticing it. Let's be clear on my question.  3 Let's say there's a warning and  4 it says Warning, are you saying it's okay for  5 that person not to read what's under that  6 Warning? I'm talking about reading.  7 A. Again, it depends upon the  8 information that it's presented with, how it's  9 presented, where it's presented, why it's  10 presented.  11 So, for example, if there's a  12 picture of a helmet and it says Warning,  13 somebody is going to infer that's probably  14 going to say, Warning, don't ride a motorcycle  15 without a helmet. So there's a good chance  16 people are going to skip it.  17 Q. Is that okay?  18 A. Absolutely. They already have  19 the information or believe they have the  20 information. So the question is, again, how  21 you're presenting the information to make sure  22 that if it's important, if it's urgent, that  23 it's set off and it's identified as such.  24 Making the warning the same as</p>

<p style="text-align: right;">Page 153</p> <p>1 all the other warnings on the page, by the  2 time I read all the other warnings I'm like  3 this is ridiculous, I don't need to know this,  4 or this isn't relevant, or I already knew  5 this, why should I read the fifth warning on  6 the page. That's a reasonable reaction of a  7 person.  8 So if it's unique and specific  9 to this bike it needs to have greater  10 prominence in the book and where it's  11 presented, not on Page 51, at the front of the  12 manual, and how it's presented. Not the same  13 type of signal word as the other four warnings  14 that are on the page that may or may not be  15 relevant to the information I need as a  16 rider.  17 So it just depends on how it's  18 presented, where it's presented, why it's  19 presented and what other information it's  20 presented with.  21 So here's a good example, on  22 Page 49: Warning, do not read -- excuse me,  23 do not ride the motorcycle after drinking  24 alcoholic beverages. I'm done reading. As a</p>	<p style="text-align: right;">Page 155</p> <p>1 anything combustible get near my exhaust  2 because it gets hot. Do I need to read the  3 rest of that to understand, no.  4 So that's the problem with the  5 way this particular warning is presented,  6 because it's in the information that's readily  7 observable, readily known. So there's no  8 reason for the user to continue reading down  9 to that third sentence that says: Oh, by the  10 way, do not allow the engine to idle  11 unnecessarily or for prolonged periods.  12 Q. So we're clear, it's okay with  13 you if the owner of a motorcycle doesn't read  14 the warning on Page 51 that we're talking  15 about, yes or no?  16 I'm not asking for reasons why  17 someone might not. I'm asking you, a warning  18 experts, is it okay -- are you saying yes,  19 it's okay, you don't to have read that?  20 A. It is foreseeable and  21 reasonable for a person not to read an  22 inadequately presented warning. So the fact  23 that it's inadequate on Page 51, 53 would be  24 reasonable for a person not to read it.</p>
<p style="text-align: right;">Page 154</p> <p>1 reasonable adult I know I should not be doing  2 that. Do I need to read the rest of that  3 paragraph, no. Is it reasonable to expect  4 that somebody is going to skip the rest of  5 that paragraph, absolutely.  6 If there is something down here  7 at the bottom of that paragraph that's not  8 really related to the top of it, but  9 particularly unique or important to this bike,  10 shouldn't it have been presented in a  11 different manner, absolutely.  12 Q. Let's talk about Page 51 where  13 on the right-hand side under Risk of -- on a  14 page it says: Important notes, where it says  15 Risk of fire, and then these big bold warning  16 placard, is it okay not to read that warning?  17 A. Well, again, as I mentioned  18 earlier, it's very possible and likely that  19 somebody is going to read, Risk of fire, high  20 temperatures occur at exhaust system,  21 particularly in a catalytic converter.  22 Warning, making sure that whether riding or  23 standing still no easily flammable material, I  24 understand what they're saying, don't let</p>	<p style="text-align: right;">Page 156</p> <p>1 Q. Is it okay with you?  2 A. It's not okay with me, but it's  3 not okay for the manufacturer to present  4 important critical safety information in an  5 inadequate fashion that encourages people not  6 to read it.  7 Q. How about on Page 60 under  8 Warning where it says: Do not warm up the  9 engine with the motorcycle at standstill -  10 Risk of overheating and fire, that's right  11 upfront, isn't it?  12 A. It's on Page 60.  13 Q. It's right under Warning,  14 right?  15 A. It is under Warning.  16 Q. Let me ask you a question: Do  17 you think the length of manuals in today's  18 world has anything to do with guys like you  19 who criticize warnings all the time and make  20 the manufacturers add a lot of warnings like  21 don't ride a motorcycle after you're drinking?  22 A. I don't know about don't ride a  23 motorcycle after drinking, but I do know  24 manufacturers choose to rely upon an</p>



<p style="text-align: right;">Page 157</p> <p>1 Instruction Manual to mitigate the design  2 defect with the motorcycle, it's inappropriate  3 and it leads to long manuals.  4 So if they had fixed it from  5 the beginning or provided an adequate  6 safeguard, there wouldn't be a need to add it  7 to the manual, maybe cut a page-and-a-half out  8 of it.  9 Q. So human factors experts have  10 no role in the length of the modern day  11 manual?  12 A. Maybe litigation attorneys.  13 Human factors experts would say fix the  14 design, provide the safeguard, do not rely  15 upon a warning. Particularly they would say  16 do not rely upon a warning in a manual.  17 As a human factors professional  18 my preference is to fix the design. When I  19 worked for the IBM Corporation I worked with  20 the engineers to fix the design before we  21 relied upon a warning in a manual around the  22 product. Eliminating it through design is  23 always the first and best option. Providing a  24 guard is the second and second best option.</p>	<p style="text-align: right;">Page 159</p> <p>1 riders. So it means everybody is wrong, or  2 does it mean BMW is wrong for depending upon a  3 warning on Page 60 of their manual to fix a  4 design defect.  5 Q. What's the point of a manual  6 then?  7 A. The point of a manual is to say  8 here are the features of the bike, if you need  9 to know them because it's not apparent in the  10 way the bike is presented then read the  11 manual.  12 From a human factors  13 standpoint, again, you make products easy to  14 use, intuitive to use. If you make them easy  15 to use and intuitive to use and you design out  16 the hazards to provide adequate safeguard the  17 need for a manual becomes less and less and  18 less. The goal of the human factors engineers  19 is to make manuals as short as possible by  20 making the design intuitive and easy to use as  21 possible.  22 Q. Do you have a list that you use  23 when you advise clients or make  24 recommendations to tell the owner of a product</p>
<p style="text-align: right;">Page 158</p> <p>1 Relying upon a manual means you've already  2 given up on your design, and that to me si  3 inappropriate.  4 Q. Go back to Page 60.  5 A. Sure.  6 Q. You criticized this warning  7 because it was on Page 60. My question is:  8 Are you saying it's okay for the owner of this  9 type of motorcycle not to read that warning,  10 not to gain the information that it provides?  11 Yes or no?  12 A. There's plenty of reasons why  13 it would okay for the owner of a motorcycle  14 not to read this part of the manual. And it  15 was foreseeable to BMW that a rider wouldn't  16 read this part of the manual, and if they  17 didn't read this part of the manual they would  18 have gotten the information presented.  19 Q. So if Mr. Yazdani didn't read  20 this manual, read this part of the manual on  21 Page 60, you're saying that's okay, good job,  22 Mr. Yazdani, good job?  23 A. I would say his behavior is  24 consistent with the majority of consumers and</p>	<p style="text-align: right;">Page 160</p> <p>1 what warnings he should or shouldn't read in  2 the manual, which ones are okay not to read?  3 A. Nope.  4 Q. Are there some warnings that  5 are okay not to read? Just forget about why  6 they might not, are there warnings that are  7 okay not to read?  8 A. Again, it's my opinion that a  9 reasonable rider, a reasonable person would be  10 reasonable in not reading an inadequate  11 warning or inadequate information that's  12 presented in an inadequate fashion.  13 Q. Tell me which warnings are okay  14 not to read.  15 A. Well --  16 Q. You just bought a motorcycle.  17 Which warnings are okay not to read?  18 A. If I bought a motorcycle and I  19 went through my rider training with BMW --  20 Q. I'm not asking that, sir. And  21 we can go around and around, and I can do the  22 same thing we've done and I'll ask them over  23 and over again. You've got your speech, I get  24 it. I'd like you to answer my question.</p>

<p style="text-align: right;">Page 161</p> <p>1 Are there warnings that are</p> <p>2 okay not to read, yes or no?</p> <p>3 A. So as I was saying --</p> <p>4 Q. I'll tell you what, answer me</p> <p>5 yes or no and then give whatever explanation</p> <p>6 you want.</p> <p>7 MR. LEVINE: I'm going to</p> <p>8 object to this question, because if you were</p> <p>9 to hear your own question, you're saying --</p> <p>10 you haven't self defined it yourself, are</p> <p>11 there warnings okay not to read?</p> <p>12 MR. HEINOLD: I don't need any</p> <p>13 more definition. Are you objecting to the</p> <p>14 form?</p> <p>15 MR. LEVINE: I'm objecting to</p> <p>16 the form because you can have 17 different</p> <p>17 meanings. So when he answers it you're not</p> <p>18 even going to know what --</p> <p>19 MR. HEINOLD: 17 different</p> <p>20 meanings to what?</p> <p>21 MR. LEVINE: It could have been</p> <p>22 warnings that are in a product, warnings that</p> <p>23 are in a manual.</p> <p>24 MR. HEINOLD: I said in a</p>	<p style="text-align: right;">Page 163</p> <p>1 manual? When someone buys this bike, do they</p> <p>2 get you too and say hey, do I have to read</p> <p>3 this warning?</p> <p>4 My question is: Somebody buys</p> <p>5 a product, they get the manual. Are there</p> <p>6 warnings that they don't have to read?</p> <p>7 You just said yes, there are</p> <p>8 warnings. So now I want to which ones they</p> <p>9 are. How do you determine which ones they</p> <p>10 are? How does he determine which ones they</p> <p>11 are?</p> <p>12 A. As I was trying to explain</p> <p>13 generally, if it's an inadequate warning it's</p> <p>14 okay not to read it because that's what you</p> <p>15 would reasonably expect from a reasonable</p> <p>16 person.</p> <p>17 There are other reasons why you</p> <p>18 wouldn't read a warning. So, for example,</p> <p>19 maybe there's a section of the manual that</p> <p>20 doesn't apply to your bike or your product,</p> <p>21 this bike is for. This bike is for R 1150s</p> <p>22 and R 850s. It may be a warning that's</p> <p>23 presented in part of the manual that something</p> <p>24 you're not going to deal with.</p>
<p style="text-align: right;">Page 162</p> <p>1 manual. I'll start over.</p> <p>2 MR. LEVINE: In this manual.</p> <p>3 BY MR. HEINOLD:</p> <p>4 Q. You just bought this</p> <p>5 motorcycle, are there warnings that are okay</p> <p>6 not to read?</p> <p>7 A. I think, again, my opinion is</p> <p>8 it's --</p> <p>9 Q. Can you answer me yes or no?</p> <p>10 Can we get that? Answer me yes or no and --</p> <p>11 MR. LEVINE: I would ask that</p> <p>12 the witness answer the question and then</p> <p>13 explain his answer.</p> <p>14 THE WITNESS: Yes, it's okay</p> <p>15 not to read inadequate warnings.</p> <p>16 BY MR. HEINOLD:</p> <p>17 Q. How does the reader know that</p> <p>18 they're inadequate if he hasn't read it?</p> <p>19 A. I think that it would be up to</p> <p>20 me to decide whether it's inadequate or not</p> <p>21 and it would be consistent with the person's</p> <p>22 behavior as to whether they read it or not as</p> <p>23 to whether it was inadequate or not.</p> <p>24 Q. But do you come with the</p>	<p style="text-align: right;">Page 164</p> <p>1 So, for example, there's a</p> <p>2 headlight basic setting in here. Maybe I'm</p> <p>3 not planning on setting my own headlights.</p> <p>4 I'll let the garage and the mechanic do that.</p> <p>5 So why am I going to read it.</p> <p>6 You know, there's different</p> <p>7 features of the bike that I may not be</p> <p>8 interested in, don't planning on using them.</p> <p>9 Therefore, the warning wouldn't be relevant to</p> <p>10 me and that would be okay not to read it.</p> <p>11 There are plenty reasons of why it would be</p> <p>12 okay not to read a warning.</p> <p>13 Q. Okay. I just bought a bike, I</p> <p>14 want you to assume that.</p> <p>15 A. Okay.</p> <p>16 Q. I picked up this manual. Is it</p> <p>17 okay for me not to read the warning on Page 60</p> <p>18 that says: Warning, do not warm up the engine</p> <p>19 with the motorcycle at a standstill - Risk of</p> <p>20 overheating and fire? Is it okay for me not</p> <p>21 to read that?</p> <p>22 A. I think it would be foreseeable</p> <p>23 that somebody would not read it, and it</p> <p>24 wouldn't be okay because they're not getting</p>

<p style="text-align: right;">Page 165</p> <p>1 important safety information, but it's not  2 their fault that they're not reading it.  3 Q. If I came to you and said hey,  4 Bill, I just bought a manual, should I read  5 it, what would you tell me? Yes or no?  6 A. I would think as a manufacturer  7 I would say I'm providing --  8 Q. That wasn't my question. I'm  9 your neighbor, Bill. Hey, Bill, I just bought  10 this, should I read this manual or not, yes or  11 no?  12 A. Yes, I would say if you find it  13 interesting go ahead and read it. If you  14 think you can ride a bike without it then  15 don't read it.  16 Q. On Page 10 -- I'm sorry, Page  17 12 of your report at the bottom flowing over  18 onto Page 13, you list 10 items that should  19 have been included in this manual regarding  20 the fire as I -- I'm sorry, the risk of fire;  21 is that correct?  22 A. I don't know what you're asking  23 me.  24 Q. Look at Page 12.</p>	<p style="text-align: right;">Page 167</p> <p>1 would have to know 1 through 10.  2 So without adequate warning you  3 would have to hope that the rider knows 1  4 through 10. As the next paragraph states,  5 most people are not going to know or have  6 information all of 1 through 10, therefore,  7 they're not going to appreciate the fire  8 hazard associated with the design defect  9 without adequate warning.  10 Q. So this doesn't have to be in  11 the manual?  12 A. I never said it had to be in  13 the manual.  14 Q. Well, that's the way I read it.  15 That's why I'm here. That's why I get to ask  16 you questions, to clarify. It's a great  17 system.  18 So what is the point of these  19 10 things? What is it you're telling us  20 should be done with this information? How is  21 it imparted to the rider?  22 A. Well, I don't know that it's  23 necessarily to impart all of it to the rider.  24 What I'm simply saying is that if you're not</p>
<p style="text-align: right;">Page 166</p> <p>1 A. Yes.  2 Q. Do you see at the bottom Item 1  3 through 9?  4 A. Yes.  5 Q. Please turn to Page 13.  6 A. Okay.  7 Q. Do you see the top, Item 10?  8 A. Yes.  9 Q. What are those?  10 A. As it states in there, it's 10  11 things that a person would need to understand  12 to foresee a potential fire hazard associated  13 with warming up the engine with motorcycle at  14 a standstill without adequate warning.  15 Q. So is it your testimony that  16 these 10 things need to be in the manual?  17 A. No.  18 Q. What's the purpose of these 10  19 things?  20 A. Well, I think it's pretty  21 explicit in the paragraph: To foresee the  22 potential fire hazard associated with warming  23 up the engine with the motorcycle at a  24 standstill without adequate warning the rider</p>	<p style="text-align: right;">Page 168</p> <p>1 going to provide adequate warning and if you  2 want the rider to appreciate the hazard, they  3 would need to know all of these 10 things.  4 And it's very unlikely that a rider would know  5 all of these 10 things, and therefore, they  6 wouldn't be aware or appreciate the hazard.  7 Q. So what is the adequate  8 warning?  9 A. I give the adequate warning on  10 Page 14 of the report.  11 Q. And that's the placard at the  12 bottom? Is that the sticker for an on-product  13 warning?  14 A. That is the example on-product  15 warning that I suggest should have been on the  16 motorcycle.  17 Q. Okay. What should have been in  18 the manual?  19 A. As I state on the top of Page  20 15, the warning itself should have been  21 repeated in the manual along with the  22 explanation of how the fire occurs. For  23 example, oil temperature increases to an  24 elevated level causing the oil sight glass to</p>

<p style="text-align: right;">Page 169</p> <p>1 fail and allow hot oil to escape the engine or  2 heat from the exhaust headers can ignite the  3 body work or wiring harness.  4 Q. Is that the language that you  5 are proposing should have been in the manual?  6 A. Sure.  7 Q. And is it just that where -- I  8 mean, I want to know precisely what it looks  9 like.  10 A. Well, I give you precisely what  11 the warning looks like on the illustration --  12 Q. That's the on-product. It's  13 the same thing?  14 A. I said it should be repeated in  15 the manual.  16 Q. So that should be repeated in  17 the manual and then what? How do you add this  18 e.g.?  19 A. You can put it right under it.  20 Q. And that's the language you  21 would use?  22 A. Sure.  23 Q. Now I understand. Why is it  24 important to have something different in the</p>	<p style="text-align: right;">Page 171</p> <p>1 adequate safeguard, such as the fan, what have  2 you, like Mike Zazula talked about.  3 If they weren't going to do  4 that, the least they could have done is put  5 the warning in Illustration 1 on Page 14 of my  6 report on the motorcycle itself and then  7 repeated the warning in the manual.  8 Q. Is it sufficient if that  9 warning is simply repeated without further  10 explanation?  11 A. I think it would be best  12 practice to include the further information.  13 Q. Is it sufficient, just the  14 warning?  15 A. I think it's sufficient with  16 just the warning on the product.  17 Q. Is it sufficient with just the  18 warning in the manual?  19 A. No. It needs to be on the  20 product.  21 Q. Let's assume the warning is on  22 the product, is it sufficient to have that  23 same warning in the manual without more?  24 A. I think you could put it in the</p>
<p style="text-align: right;">Page 170</p> <p>1 manual than on the product?  2 A. I didn't say it was.  3 Q. All right.  4 MR. LEVINE: He said he didn't  5 say that.  6 MR. HEINOLD: I'm starting a  7 new question. My question, as I recall, why  8 is it important to have it more in the manual,  9 and he said it's not.  10 THE WITNESS: No. I said I  11 didn't say that. You said that. I didn't say  12 that.  13 BY MR. HEINOLD:  14 Q. Is it important to have more in  15 the manual?  16 A. I don't know that it is, but  17 certainly you can.  18 Q. Let's be really clear then.  19 What is it that needs to be on this motorcycle  20 in order to make it safe for its intended use?  21 A. They need to fix the design  22 defect, make it safe for its intended use. If  23 they weren't going to provide or eliminate the  24 hazard for design they need to provide an</p>	<p style="text-align: right;">Page 172</p> <p>1 manual and you can add the information as best  2 practice or you can leave it off. I don't  3 think it's going to make that big of a  4 difference.  5 Q. So it's sufficient not to add  6 the additional information that's at the top  7 of Page 15?  8 A. All right. I think -- it's  9 given the placement in the manual you should  10 provide the information at the top of Page 15  11 in the manual. I think it provides additional  12 information for the user to understand what  13 the issue is, what the hazard is and why it's  14 occurring, increasing their understanding of  15 the event and increasing the propensity to  16 follow the warning.  17 Q. So the understanding of the  18 event is not sufficient in a manual if you  19 just put the warning illustration, repeat that  20 in the manual?  21 A. I'm not sure what you're asking  22 me.  23 Q. I'm having trouble  24 understanding what you're telling me. I</p>

<p style="text-align: right;">Page 173</p> <p>1 really don't mean to be repetitive, but the  2 warning that's an illustration on Page 14  3 should be on the motorcycle?  4 A. I'm sorry, my opinion is that  5 the warning that's on Page 14, and it's under  6 Illustration 1, is an example of on-product  7 warning, meaning the ANSI Z535.4 2002 criteria  8 for on-product safety warnings, BMW North  9 America should have presented on the bike.  10 Q. Okay. And that is sufficient.  11 They don't need to put on the bike an  12 explanation about the oil temperature  13 increases elevated level causing the oil sight  14 glass to fail; correct?  15 A. They don't need to put that  16 information on the bike.  17 Q. Okay. Now I want to talk about  18 the manual. I want to assume this warning is  19 on the bike, okay?  20 A. Okay.  21 Q. If we put that placard, that  22 warning label that you have just said is  23 satisfactory to put on the product, if there  24 is -- if that is all that is in the manual on</p>	<p style="text-align: right;">Page 175</p> <p>1 words, and you may not have understood the  2 question, he said if the warning is on the  3 bike and the warning is in the manual, do you  4 also require, correct me if I'm wrong, that  5 the explanation following the warning is also  6 in the manual? I think that was your  7 question.  8 MR. HEINOLD: Yes.  9 THE WITNESS: I would say yes  10 because there's no reason not to put it.  11 BY MR. HEINOLD:  12 Q. In your report you criticize  13 BMW NA because -- you talk about you can't  14 rely on second purchasers getting the manual;  15 correct?  16 A. Okay. I think it's a true  17 statement.  18 Q. But is that relevant to this  19 case?  20 A. What do you mean?  21 Q. Because Mr. Yazdani got the  22 manual and he received that?  23 A. Yeah, it's not really relevant  24 to what Mr. Yazdani did with respect to</p>
<p style="text-align: right;">Page 174</p> <p>1 the top, is that sufficient for the manual, or  2 do you require this additional information to  3 be in the manual to make the bike safe for its  4 intended use? Require is my word.  5 A. So I guess I'm having a problem  6 with make it safe. The manual is really an  7 afterthought. I mean, you put it on the bike  8 so people see, read it and understand it, but  9 you put it in the manual for completeness  10 sake. Whether or not you put the explanation  11 of it for best practices, yes, it should be  12 there. If you don't put it, is it going to  13 make that big of a difference, probably not,  14 because if they're not getting it on the bike  15 they're really not likely to get it from the  16 manual.  17 You know, as we had this  18 discussion earlier about whether or not --  19 MR. LEVINE: One second. He  20 asked you when answering that question to  21 assume that the warning was on the bike.  22 Am I right about that?  23 MR. HEINOLD: Oh, yes.  24 MR. LEVINE: So, in other</p>	<p style="text-align: right;">Page 176</p> <p>1 whether or not the motorcycle was defective  2 and whether or not BMW failed to provide  3 adequate warning.  4 Q. We can dance around this, sir.  5 You know I'm trying to be respectful, and  6 personally, I think you're avoiding my  7 questions. And we can just do some things  8 really simply and get to the nuggets of what  9 we want.  10 My question is this: You have  11 criticized my client for relying on -- strike  12 that. You criticized my client because they  13 may not -- a second purchaser, used purchaser  14 may not get the manual, correct?  15 You rendered that criticism in  16 your report. That is easy to answer yes or  17 no. Did you or did you not render that  18 criticism in your report?  19 A. What I said in the report is  20 that BMW couldn't rely upon secondhand users  21 having the manual.  22 Q. Is that relevant to this case?  23 And I ask that question because Mr. Yazdani as  24 a secondhand user received the manual, did he</p>



Page 177

1 not?  
2 A. You just asked me two  
3 questions. So which one do you want me to  
4 answer?  
5 Q. Both.  
6 A. Is it relevant to this case,  
7 yes. Did Mr. Yazdani get a manual with the  
8 bike, yes.  
9 Q. Why is it relevant to this case  
10 if he received a manual?  
11 A. Because my opinions with  
12 respect to the defect and the failure to warn  
13 is on all of these motorcycles that have this  
14 unique and specific fire hazard, not just Mr.  
15 Yazdani's. I didn't write a report  
16 specifically for Mr. Yazdani's bike. I wrote  
17 it for the product at issue, the R 1150 R.  
18 Q. I'd like you to look at Page 6  
19 of your report. We'll come back to that. I  
20 can't find the reference. It is on Page 6.  
21 The bottom paragraph beginning with the word,  
22 However... Are you with me?  
23 A. Yes.  
24 Q. However, it's not reasonable

Page 178

1 for to BMW NA to rely solely on the Rider's  
2 Manual to communicate critical safety related  
3 information and warnings to secondary owners  
4 of the R 1150 R motorcycle.  
5 What are the critical safety  
6 related -- what is the critical related  
7 safety -- I'm going to start over.  
8 What is the critical safety  
9 related information and warnings to which you  
10 are referring in that sentence?  
11 A. Well, it's the one we're  
12 talking about, the one that I have on Page 14  
13 in my report.  
14 Q. So what is the alternative to  
15 not relying on the Rider's Manual?  
16 A. Well, as we discussed several  
17 times, the alternative is to mitigate it  
18 through fixing the design, providing a  
19 safeguard. And then if you're not going to do  
20 those two, provide an on-product warning as I  
21 depicted on Page 15 of my report.  
22 Q. So your reference there is only  
23 to critical safety related information  
24 relating to this issue for this fire, from

Page 179

1 leaving the vehicle idle at a standstill?  
2 A. That's what my report is about,  
3 but I'm not exactly sure what you're asking  
4 me.  
5 Q. Well, I'm reading, is that what  
6 you're referring to?  
7 A. Well, what I'm referring to  
8 there is critical warning and safety  
9 instructions must be provided where and when  
10 the information is needed and where the  
11 information is most likely encountered and  
12 seen.  
13 I don't know what other design  
14 defects that are on this bike that an  
15 on-product warning may need to be considered  
16 as a third alternative, but I'm speaking  
17 specifically in this report to the warning  
18 that I have on Page 14.  
19 Q. Does it have to be a product  
20 defect to have a warning?  
21 A. Well, it could be -- it doesn't  
22 have to be a defect. It has to be critical  
23 warning and safety instructions. So it has to  
24 be important.

Page 180

1 Q. So aren't you saying here that  
2 BMW should not rely on the Rider's Manual to  
3 communicate critical safety related  
4 information of any type to secondary owners?  
5 A. Again, it depends on what the  
6 issue is. If there is a critical issue that  
7 needs to be communicated for the operator to  
8 safely use the bike, then burying it in the  
9 manual as the sole and only way that you're  
10 communicating it is ineffective.  
11 So then they got to figure out  
12 what is the best way to deal with that hazard,  
13 and putting it in the manual is not the best  
14 way to deal with that hazard.  
15 Q. But is this the only safety  
16 related information that's critical to the  
17 safe operation of a motorcycle?  
18 A. I haven't analyzed the complete  
19 design of the bike and all the hazards  
20 associated with its design. I'm only  
21 concerned about this particular issue, the  
22 fire because of the oil sight glass failure  
23 when the bike is allowed to idle standstill.  
24 Q. But your point is we have a

<p style="text-align: right;">Page 181</p> <p>1 potential for a secondhand user and we have  2 critical information that's in the manual that  3 he might not get or she might not get;  4 correct?  5 A. Absolutely.  6 Q. And therefore, there needs to  7 be another way to communicate?  8 A. It depends on how you're  9 dealing with issue, what the issue is.  10 So, again, in this case we have  11 an atypical problem. Most bikes when you let  12 them idle at a standstill don't catch on fire.  13 A lot of people allow their bikes to warm up  14 at a standstill for different periods of time  15 that are not aware that this is a potential  16 problem with the BMW R 1150.  17 Because of that they needed to  18 find a different way to communicate that  19 information to the user if they're going to  20 choose not to fix it by changing the design or  21 providing a necessary safeguard.  22 Q. I can understand why you don't  23 want to answer my question. So let's try it  24 again. This issue, I don't need to hear your</p>	<p style="text-align: right;">Page 183</p> <p>1 Q. Okay. Does Harley-Davidson  2 have to be concerned about critical safety  3 related warnings not being communicated to  4 secondary owners?  5 A. I think that Harley-Davidson in  6 their hazard analysis and safety analysis of  7 their motorcycles would want to see what  8 hazards are associated with its product,  9 eliminate those that they can through design,  10 provide adequate safeguards and then determine  11 whether or not a warning in the manual is  12 appropriate or whether or not it needs to be  13 on the product because it's atypical and not  14 something that most riders would be aware of  15 or think about.  16 MR. HEINOLD: Ken, I'm getting  17 this close to saying let's go see a Judge.  18 MR. LEVINE: I think it's a  19 middle ground, frankly. I think that he can  20 answer the questions yes or no and then give  21 an explanation.  22 MR. HEINOLD: You know what I'm  23 asking. You know what I'm asking. You don't  24 have to admit this on the record. You know</p>
<p style="text-align: right;">Page 182</p> <p>1 opinion on this issue, I think I've heard it  2 100 times perhaps.  3 My question is: Your  4 criticizing my client on relying on a manual  5 to communicate critical safety related  6 information and warnings, plural, to secondary  7 owners; correct? You criticized my client for  8 that, yes?  9 A. I -- yes, it's --  10 Q. Is this the only -- is this  11 issue the only critical safety related  12 information or warning that has to be  13 communicated in some other manner if we accept  14 your criticism?  15 A. I'm sorry, I did not analyze  16 the complete BMW R 1150 R to determine what  17 other defects may or may not have been present  18 and what other critical warnings or safety  19 information needs to be presented on the bike.  20 Q. Should Harley-Davidson be  21 concerned about the same thing?  22 A. Harley-Davidson doesn't have  23 the same defect, so I wouldn't think they  24 would be concerned about the same thing.</p>	<p style="text-align: right;">Page 184</p> <p>1 what I'm asking and you know he's not  2 answering.  3 MR. LEVINE: I'm going to  4 disagree with that. And I agreed with you  5 before, by the way. I agreed with you before  6 that he wasn't answering your question.  7 You're asking him something  8 that from his analysis standpoint takes a lot  9 more than a yes or no. It just does. You can  10 tell the way that this witness does his  11 analysis.  12 MR. HEINOLD: Excuse me for  13 interrupting --  14 MR. LEVINE: No, it's okay.  15 The truth is -- you want to know -- the last  16 question was does Harley-Davidson need to put  17 any specific -- let me use the proper words  18 here, any specific critical safety related  19 information physically on their bikes?  20 MR. HEINOLD: No, I didn't say  21 that.  22 MR. LEVINE: I apologize, I  23 thought that was your question.  24 MR. HEINOLD: I didn't say that</p>

<p style="text-align: right;">Page 185</p> <p>1 at all.</p> <p>2 MR. LEVINE: I thought that was</p> <p>3 your question.</p> <p>4 MR. HEINOLD: I'll tell you</p> <p>5 what, I'm going to tell you, okay, and then</p> <p>6 you see if he answers the question.</p> <p>7 MR. LEVINE: Fair enough.</p> <p>8 MR. HEINOLD: Okay.</p> <p>9 MR. HEINOLD: This is an</p> <p>10 explanation with a question at the end. I'm</p> <p>11 sure you're intelligent to follow it and not</p> <p>12 have to sort through it and say this big long</p> <p>13 thing.</p> <p>14 MR. LEVINE: I'm ready.</p> <p>15 MR. HEINOLD: He's made a</p> <p>16 statement critical of my client for relying on</p> <p>17 a manual to communicate critical safety</p> <p>18 related information to people who buy used</p> <p>19 motorcycles because they might not get it.</p> <p>20 MR. LEVINE: Yes.</p> <p>21 BY MR. HEINOLD:</p> <p>22 Q. Correct?</p> <p>23 A. Sure.</p> <p>24 Q. Okay.</p>	<p style="text-align: right;">Page 187</p> <p>1 agree with that.</p> <p>2 BY MR. HEINOLD:</p> <p>3 Q. So I accept the proposition</p> <p>4 there may be. Do you accept that proposition?</p> <p>5 A. If you asked that question I</p> <p>6 would say maybe, sure.</p> <p>7 MR. LEVINE: And also, then you</p> <p>8 said to him what other critical related safety</p> <p>9 information would be required? To which I</p> <p>10 believe the witness said, I have not analyzed</p> <p>11 the bike for any other issue other than this</p> <p>12 particular one, which I found to be of a</p> <p>13 critical related, safety related information</p> <p>14 issue. And then I believe --</p> <p>15 MR. HEINOLD: And then I think</p> <p>16 he went on to --</p> <p>17 MR. LEVINE: Well, he does his</p> <p>18 thing.</p> <p>19 MR. HEINOLD: -- a soliloquy.</p> <p>20 MR. LEVINE: Well, let me say</p> <p>21 this to you in defense to the gentleman to my</p> <p>22 right, and that is this: We continue to focus</p> <p>23 on whether or not it was right or wrong for a</p> <p>24 warning to be placed on the bike, because I</p>
<p style="text-align: right;">Page 186</p> <p>1 MR. HEINOLD: So, I want to</p> <p>2 know is this the only critical safety related</p> <p>3 information, this issue in this case, to which</p> <p>4 he's referring, or is he talking generically?</p> <p>5 MR. LEVINE: I can answer your</p> <p>6 question.</p> <p>7 MR. HEINOLD: I know you can</p> <p>8 answer it.</p> <p>9 MR. LEVINE: And I believe that</p> <p>10 he has, actually.</p> <p>11 MR. HEINOLD: What do you think</p> <p>12 the answer is?</p> <p>13 MR. LEVINE: As written there,</p> <p>14 it was meant to express the concept in</p> <p>15 general.</p> <p>16 MR. HEINOLD: In general?</p> <p>17 MR. LEVINE: Yes, in general.</p> <p>18 MR. HEINOLD: That means, Ken,</p> <p>19 does it not, that there's more than one issue</p> <p>20 that has to be communicated in a critical</p> <p>21 safety related warning in an alternate --</p> <p>22 MR. LEVINE: There may be.</p> <p>23 MR. HEINOLD: There may be.</p> <p>24 MR. LEVINE: There may be, I</p>	<p style="text-align: right;">Page 188</p> <p>1 know that's part of this case, but when asked</p> <p>2 about the behavior, whether or not that was</p> <p>3 right or wrong, inherently as an ergonomics</p> <p>4 guy he also wants to say that we should never</p> <p>5 even -- in addition to your focus on that</p> <p>6 issue, we should never have gotten there, and</p> <p>7 he is fearful that it will get lost in the</p> <p>8 wash and then it will be only the answer to</p> <p>9 the very isolated question you have.</p> <p>10 By the way, you then went on to</p> <p>11 ask him about the Harley-Davidson, whether or</p> <p>12 not their critical related safety information</p> <p>13 that they should have physically put on it, to</p> <p>14 which he went into his very long answer that I</p> <p>15 haven't analyzed the Harley-Davidson.</p> <p>16 MR. HEINOLD: I asked that</p> <p>17 because he wouldn't answer my other question.</p> <p>18 It's a simple question.</p> <p>19 MR. LEVINE: I can answer that.</p> <p>20 BY MR. HEINOLD:</p> <p>21 Q. It's a simple question. If</p> <p>22 you're not going to produce the manual -- if</p> <p>23 they're not going to get the manual because</p> <p>24 they're a secondhand user, would you agree</p>

<p style="text-align: right;">Page 189</p> <p>1 with me there's probably a whole bunch of  2 stuff that they ought to know that they're not  3 going to get?  4 A. It's possible.  5 Q. Okay, it's possible. And if  6 they're not going to get it, is the solution  7 to put something on the product?  8 A. It depends on what the issue  9 is.  10 Q. You hold open the possibility  11 that you might have other -- you haven't done  12 the analysis, I understand that, to hold open  13 the possibility that there might be other  14 issues that you have to put on the product?  15 A. Anything is possible.  16 Q. You don't know?  17 A. I don't know what?  18 Q. You don't know whether there  19 would or wouldn't be more?  20 A. As I said earlier, I did not  21 analyze the complete bike to determine what  22 other defects there may be that would require  23 a warning because BMW chose not to deal with  24 it in its design.</p>	<p style="text-align: right;">Page 191</p> <p>1 It would be the manufacturer's  2 responsibility to do that study to determine  3 what may or may not be appropriate.  4 Q. In the human factors world of  5 expertise, are there any warnings or  6 instructions, warnings or research that would  7 tell you that?  8 A. Tell me what?  9 Q. Tell you about how -- how to  10 determine how many warnings there would be so  11 as to avoid interference with understanding?  12 A. Sure, there's all kinds of text  13 and research, not necessarily text,  14 publications, guidelines on how to conduct  15 usability testing on your product to determine  16 whether or not a warning is appropriate,  17 whether the number of warnings you're  18 providing is appropriate.  19 I conducted many of tests like  20 that when I was with the IBM Corporation to  21 determine what worked and what didn't work.  22 Q. On what?  23 A. On products.  24 Q. No, but on-product warnings?</p>
<p style="text-align: right;">Page 190</p> <p>1 Q. You've talked about on-product  2 warning is necessary because of the clutter of  3 information, 89 Pages of the Rider's Manual;  4 correct?  5 A. That is a problem with  6 presenting warnings in manuals.  7 Q. Can you have too many  8 on-product warnings?  9 A. Sure.  10 Q. Can you create clutter there?  11 A. Sure.  12 Q. Can it interfere with  13 understanding awareness and recollection?  14 A. Of each -- or a single  15 individual warning, sure.  16 Q. Is there any study or research  17 or literature that tells how many such  18 warnings would create clutter?  19 A. There's not research that's  20 going to tell you any given situation whether  21 or not it would be considered clutter or have  22 a detrimental effect on the individual's  23 warnings ability to draw attention, have  24 somebody read it and understand it.</p>	<p style="text-align: right;">Page 192</p> <p>1 I'm talking about --  2 A. Yes, on-product warnings and  3 manual warnings, whatever the case may be.  4 Again, and I know you don't  5 want to hear it, but the warning design is an  6 integral part of the product design. You  7 don't wait until the product is done and then  8 figure out that you have all these unaddressed  9 hazards and now you have to figure out what  10 warnings you're going to stick on the product  11 to make it safe.  12 You determine what hazards  13 there are with your product, and then you go  14 through the safety hierarchy, which ones can I  15 eliminate through design, which ones can I  16 minimize through design, which ones can I  17 provide a safeguard for.  18 At the end of the day what  19 happens is that list of hazards shrinks, and  20 now you're down to whatever residual hazards  21 are left and you have to decide on how you're  22 going to warn. And part of that decision is  23 what goes on the product, what goes in the  24 manual. And you decide that based upon</p>

<p style="text-align: right;">Page 193</p> <p>1 consequences such as death and severe property  2 damage as opposed to a paper cut and maybe I  3 ruined the chrome on my exhaust. So there's  4 different levels of the severity of the  5 hazard.  6 You deal with it based on how  7 you expect people are going to use your  8 motorcycle, how people use the other  9 motorcycles and the knowledge that the people  10 are most likely going to have.  11 So if it's an issue well, we  12 want to warn people to wear a helmet, that's  13 probably not something you need to put on the  14 bike itself, but something you can regulate or  15 set off into the manual.  16 But if you have a unique fire  17 hazard associated with the design of your oil  18 sight glass, that's something that can lead to  19 severe consequences, including severe injury  20 or death and property damage. And two, it's  21 inconsistent with the way you know people use  22 bikes. And three, it's inconsistent with  23 people's knowledge of how you can safely use  24 the bike.</p>	<p style="text-align: right;">Page 195</p> <p>1 MR. LEVINE: Off the record.  2 - - -  3 (Whereupon a discussion was held off  4 the record.)  5 - - -  6 BY MR. HEINOLD:  7 Q. One warning says: Before you  8 operate this vehicle read the Owner's Manual  9 and all labels. The other says: Always wear  10 approved motorcycle helmet, eye protection and  11 protective clothing. The other on the  12 windshield says: Caution, cleaning with  13 alkaline or acid cleaner gasoline solvent will  14 damage the windshield. Use neutral material.  15 Do you believe both of those  16 are necessary?  17 A. I didn't do an analysis to  18 determine if they were necessary on that  19 Yamaha. I brought those pictures to depict  20 the fact that some manufacturers do, in fact,  21 put multiple warnings that they feel are  22 necessary on the bike.  23 Q. So you haven't done an analysis  24 of whether there might be others that you</p>
<p style="text-align: right;">Page 194</p> <p>1 So those three factors make it  2 important that it be on the product as opposed  3 to another hazard that may not be as severe or  4 people may know about it generally or is  5 consistent with how people typically use their  6 bike.  7 Q. Have you done an analysis for  8 this bike, this manual, to determine whether  9 there should be any other on-product warnings?  10 A. I have not.  11 Q. Do you agree or disagree with  12 the possibility that there might be the need  13 for one if you did that analysis, one or more?  14 A. It's certainly possible. I  15 showed you a photograph of that Yamaha earlier  16 that had two warnings that were conspicuously  17 placed on the motorcycle, one on the  18 windshield and one on the top of the gasket.  19 Q. We didn't get copies of those  20 yet. You referred to the fact that you had  21 looked at them and had it included in your  22 report, but I didn't see them yet.  23 A. I'm sorry, I'll pull them out  24 right now. There you go.</p>	<p style="text-align: right;">Page 196</p> <p>1 would think would be appropriate to put -- to  2 use as on-product warnings if that was the  3 issue before you; correct?  4 A. I think that I've answered this  5 multiple times, but I have not done that  6 analysis. So I do not have an answer to your  7 question.  8 Q. Are there any guidelines that  9 say how many is too many?  10 A. There are no guidelines that  11 say how many is too many. If you have a list  12 of warnings or hazards that you rely upon  13 warnings, the guideline is to make sure that  14 during design you're eliminating those that  15 you can through design and provide guards for  16 those you can't.  17 When you've gone through that  18 process and you are left with the warnings,  19 then you have to determine how you're going to  20 present it. And it can be on the product or  21 in the manual, and that decision is based upon  22 those things I talked about earlier.  23 Q. And if you've gone through all  24 of that and you determined that there are a</p>



<p style="text-align: right;">Page 197</p> <p>1 lot of things that you want to put on -- a lot  2 of labels and warnings and instructions that  3 you want to put on the motorcycle so that  4 someone doesn't sue you if they don't follow  5 it, are there -- is there any literature, is  6 there any scientific approach to say how many  7 is too many?  8 A. There is a scientific approach.  9 Q. What is it?  10 A. It is the manufacturer's  11 responsibility to do their testing. If  12 they've got that many warnings left over that  13 they decided need to be on the bike they  14 better go and do their testing to insure that  15 they can do it appropriately. If they can't  16 do it appropriately, then they need to start  17 reconsidering whether or not they should be  18 offering that product for sale.  19 Q. But from a warnings standpoint,  20 an expert such as yourself, there's no  21 guideline that says woh, that's too many,  22 right?  23 A. There's no specific number of  24 warnings that are considered too many</p>	<p style="text-align: right;">Page 199</p> <p>1 A. Again, there are guidelines on  2 what you do. You can reference some of them  3 in my report. The very first reference is the  4 National Safety Council's Accident Prevention  5 Manual for Business and Industry  6 Administration Programs, 12th Edition. In  7 there they give a whole chapter, I've cited on  8 loss control and product safety. They tell  9 you the process that you need to go through to  10 analyze the hazards associated with your  11 product to determine how you're going to  12 mitigate it.  13 There are references and  14 guidelines with respect to determining which  15 warnings need to be on the product versus  16 need -- or could be in the manual.  17 Then after you decided which  18 can be eliminated or which should be  19 eliminated through design, which should be  20 guarded, so it's the residual hazards such as  21 hazards, all hazards, the residual hazards,  22 maybe that's a key step I'm not emphasizing  23 enough.  24 MR. LEVINE: Oh, you're</p>
<p style="text-align: right;">Page 198</p> <p>1 warnings.  2 Q. But you agree that someone  3 could put too many on there?  4 A. A lot of manufacturers do.  5 Q. On product?  6 A. On products.  7 Q. And when you say they do, you  8 mean they do put too many on there?  9 A. Absolutely.  10 Q. And the consequence of that is  11 an interference with the whole purpose of  12 having the warning in the first place?  13 A. It can have a detrimental  14 effect on any single or any individual warning  15 within that clutter.  16 Q. But that decision has to be  17 made individually by a manufacturer?  18 A. It needs to be made by the  19 manufacturer. They're in control of their  20 product.  21 Q. But there's no technique, no  22 guideline, no peer-reviewed studies, no any of  23 that they can refer to that says this is --  24 here's the guidelines?</p>	<p style="text-align: right;">Page 200</p> <p>1 emphasizing.  2 BY MR. HEINOLD:  3 Q. You're emphasizing.  4 A. But then there is a list of  5 other warnings related references that I cited  6 that deal with how to determine what warnings  7 go on the product, what warnings don't, and it  8 gets down to the severity of the injury, the  9 likelihood of the people having the knowledge  10 beforehand, and how the product is typically  11 used or commonly used.  12 So those three factors hedge to  13 the fact that it needs to be on the product.  14 If you have several hazards that are  15 associated or have that same characterization  16 and you decided that they need to be on the  17 product, now you go do your own testing to  18 determine how you're going to best present  19 them. And if you can't best present them,  20 then you got to question whether or not it's  21 safe to launch the product into the  22 marketplace.  23 Q. Okay. So that's my question.  24 You did all of the dissertation about how to</p>

<p style="text-align: right;">Page 201</p> <p>1 decide if you need to put a label on a  2 product, and then the question that I'm  3 interested in is: Well, then how many can you  4 put on there? And you said you would have to  5 do your own testing. That's the answer to  6 that question, right?  7 A. It's an empirical question.  8 Yes.  9 Q. Okay. So then you agree with  10 me that when I'm -- well, you're agreeing with  11 me because I'm not -- I'm asking the question,  12 but my understanding from what you said is  13 that there are no guidelines about how many  14 you can put on the product so that you don't  15 achieve clutter and interference, or where you  16 have to put them, if you've got a product, you  17 got multiple warnings, you have to determine  18 that individually; correct?  19 A. Well, part of what you said was  20 correct. Part of what you said was incorrect.  21 Q. What part was correct?  22 A. That you have -- you're the  23 product manufacturer, it's your product,  24 you're going to have to decide where to put</p>	<p style="text-align: right;">Page 203</p> <p>1 If you don't have the ability  2 in-house, you hire a human factors consulting  3 company to do it for you. You guys can call  4 me, I'd be happy to do it for you. I offer  5 that service.  6 Q. Did you say usability testing?  7 A. Yes.  8 Q. What is usability testing?  9 A. Usability testing is, in  10 essence, taking your users and providing them  11 or allowing them to interface with your  12 product and determine whether or not whatever  13 feature you're interested in is usable.  14 So, in the case of warnings,  15 you want to know whether or not the two,  16 three, four, five or how many warnings you're  17 considering putting on the product, the place  18 where you're considering to put it on would be  19 effective. So you run them through hands-on  20 testing with the product.  21 You can even start with doing  22 mock-ups, pencil paper mock-ups where you're  23 just showing users the design. If this is the  24 design of a motorcycle and I put a warning</p>
<p style="text-align: right;">Page 202</p> <p>1 those warnings if you have multiple warnings.  2 Q. Okay. How many?  3 A. That's up to the manufacturer  4 to decide. If they narrowed it down that they  5 have of list of two, 10, 20, whatever the case  6 may be, they have to decide can they do that  7 adequately.  8 Q. Okay. And there's nothing that  9 they can refer that gives them the important  10 factors about how to make that decision; is  11 that right?  12 A. That's not right.  13 Q. Okay. Where is it?  14 A. The guidelines talk about what  15 warnings should be -- how you prioritize  16 warnings.  17 Q. Yes.  18 A. Okay. Now, once you prioritize  19 it and you're trying to decide which ones go  20 on the product or how many, I should say, can  21 fit on the product, that's empirical testing.  22 There's guidelines how to conduct usability  23 testing. There's, you know, dozens and dozens  24 of books on how to conduct usability testing.</p>	<p style="text-align: right;">Page 204</p> <p>1 here, would this capture your attention? You  2 can mock it up with Styro-foam if you have,  3 physically place the warnings where you think  4 that they're relevant or should be placed and  5 have the users conduct tasks and determine  6 whether or not they're seeing them, reading  7 them, understanding them and complying with  8 them.  9 As you get farther along in  10 developing, you can actually take the  11 motorcycle and have alternative places where  12 you're going to test to determine what works  13 and what doesn't work. This is all empirical  14 testing.  15 Q. If somebody was to come in this  16 case and say we need 25 labels, and that's too  17 many because it will create clutter, what  18 would you have to do to say no, they're wrong,  19 in terms of creating clutter?  20 MR. LEVINE: Can I interrupt  21 for one second just so I understand. Do you  22 mean 25 in one place or 25 all over the  23 product?  24 MR. HEINOLD: All over the</p>

<p style="text-align: right;">Page 205</p> <p>1 product.</p> <p>2 THE WITNESS: First I would</p> <p>3 want to know why they have that many. That</p> <p>4 would be the absolute first question. I'd</p> <p>5 want to know what was done to eliminate</p> <p>6 through design, what was done to guard against</p> <p>7 it. Then I would want to know the</p> <p>8 prioritization that was given to each of the</p> <p>9 warnings. Then I want to know were they</p> <p>10 relevant to on the bike, when they're</p> <p>11 relevant, where they're relevant.</p> <p>12 So, for example, if it has</p> <p>13 something to do with bleeding the brakes, for</p> <p>14 example, the warning being placed on the gas</p> <p>15 tank is probably not the appropriate place for</p> <p>16 it. You would probably want it down on the</p> <p>17 caliber. So it could be that when you get</p> <p>18 done you can find the spots that are relevant</p> <p>19 on the bike and place them specifically at</p> <p>20 those spots and you decrease the issue of</p> <p>21 clutter.</p> <p>22 If they're all relevant to the</p> <p>23 tank, the gas tank, let's say you've got 10</p> <p>24 warnings that are related to the gas tank, I</p>	<p style="text-align: right;">Page 207</p> <p>1 interference with the transmission of useful</p> <p>2 safety information or not? Usability test?</p> <p>3 A. Again, I can offer to do the</p> <p>4 usability testing. I can look at it and do a</p> <p>5 heuristic evaluation of it.</p> <p>6 MR. LEVINE: A what?</p> <p>7 THE WITNESS: Heuristic.</p> <p>8 BY MR. HEINOLD:</p> <p>9 Q. That's off the cuff?</p> <p>10 A. I'm sorry?</p> <p>11 Q. Is that like off the cuff?</p> <p>12 A. No. It's done based on what</p> <p>13 the professional knowledge and experience</p> <p>14 looking at the standards, guidelines and</p> <p>15 recommendations are from warning design,</p> <p>16 seeing whether or not you can meet those. So</p> <p>17 that's a certainly a way to do it.</p> <p>18 But again, you've got a</p> <p>19 hypothetical that is so outlandish that it</p> <p>20 stretches the imagination in the realms of</p> <p>21 possibility. If you have 20 different</p> <p>22 warnings that had to go on the gas tank, you</p> <p>23 know, my first inclination is that you can't</p> <p>24 do it, that this is ridiculous. You shouldn't</p>
<p style="text-align: right;">Page 206</p> <p>1 don't see how that's possible, then you got to</p> <p>2 look at whether or not they can be combined</p> <p>3 into a single one.</p> <p>4 I think the -- for example, the</p> <p>5 Yamaha warning that you looked at earlier,</p> <p>6 there was two different topics addressed in</p> <p>7 the same warning, so that's a multi topic</p> <p>8 warning. That's one way to reduce it. You</p> <p>9 know, there's just multiple ways of doing it.</p> <p>10 Q. So, if somebody said look, we</p> <p>11 have made a determination that we need to put</p> <p>12 20 stickers on the gas tank, what would you</p> <p>13 have to do to say no, that would be clutter,</p> <p>14 that would be too many?</p> <p>15 A. Again, I would have to look at</p> <p>16 what was done from a hazard analysis --</p> <p>17 Q. You said all that. I'm</p> <p>18 assuming you've done that. Now we've</p> <p>19 concluded that there's 20 pieces of</p> <p>20 information that need to be imparted in order</p> <p>21 for us to feel as if our product is safe, but</p> <p>22 we're concerned about clutter so we can't do</p> <p>23 that, what would you have to do to determine</p> <p>24 whether that would create clutter and be an</p>	<p style="text-align: right;">Page 208</p> <p>1 have this many hazards associated with the gas</p> <p>2 tank. What did you do differently or wrong</p> <p>3 with your design that requires 20 different</p> <p>4 warnings on the gas tank.</p> <p>5 Q. So if I distill all this, you</p> <p>6 would have to do a usability test to determine</p> <p>7 whether that particular decision of 20</p> <p>8 stickers on the gas tank would create clutter</p> <p>9 or interfere with the transmission of safety</p> <p>10 information because, as I understand, there's</p> <p>11 no guideline that says anything more than five</p> <p>12 is too many, you need to have five to seven,</p> <p>13 you know, anything like that?</p> <p>14 You would have to look at all</p> <p>15 the other things you talked about to make that</p> <p>16 kind of decision; is that right?</p> <p>17 A. I would say you're incorrect.</p> <p>18 For 20 different warnings on the gas tank, I</p> <p>19 think I can safely look at that and say that</p> <p>20 that would be inappropriate and inadequate.</p> <p>21 Q. Well, what -- that would be</p> <p>22 your opinion, right?</p> <p>23 A. That would be my learned</p> <p>24 opinion based on my education, training and</p>